161 U S 545

CERTIFICATE.

161-545

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~539.~~ 242

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ETTA JAMES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JUNE 12, 1893.

(15,333)

THE LAW ASSOCIATION OF PHILADELPHIA.

Transcripts
of
Record
1895

967

Supreme Court U. States

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515 — 646

(15,333.)

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INDEX.

	Original.	Print.
Certificate	1	1
Statement of facts	1	1
Questions certified	13	8
Clerk's certificate	15	9
Stipulation to amend record	17	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 17, 1894.

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Questions certified	13	8
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Stipulation to amend record	17	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 17, 1894.

1 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1893.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY CO., Plaintiff in Error,
vs.
ETTA JAMES, Defendant. } No. 238.

In error to the United States circuit court for the western district of Arkansas.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Paul, Minnesota, on this 29th day of May, 1893, hereby certifies that upon the record on file in said court in the case wherein The St. Louis & San Francisco Railway Company is plaintiff in error and Etta James is defendant in error, which is now pending before this court upon a writ of error duly issued to the United States circuit court for the western district of Arkansas, the following facts are made to appear:

First. On December 24, 1892, Etta James, defendant in error, brought this action in the circuit court for the western district of Arkansas against The St. Louis & San Francisco Railway Co., plaintiff in error, for negligence in maintaining a switch target at Monett, in Barry county, in the State of Missouri, so near its tracks that her husband was struck and killed by it on July 3, 1889, while employed as a fireman on one of the company's engines. Her husband resided at Monett and died intestate. The defendant in error was the widow and sole heir-at-law of her husband and no administrator of his estate was appointed in Arkansas. She recovered a judgment of $5,000.

2 Second. Etta James, the defendant in error, resided at Monett, and was a citizen of the State of Missouri. Monett is a station in Missouri, on the railroad of the plaintiff in error, about fifty miles from the southern border of that State.

Third. The St. Louis & San Francisco Railway Co. was organized and incorporated under the laws of the State of Missouri in 1876, and soon thereafter became the owner of and has ever since owned and operated a railroad in that State extending from Monett southerly to the southern border of the State of Missouri.

Fourth. Section 11 of article 12 of the constitution of the State of Arkansas, which was adopted in 1874, provide that—

"Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this State except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than

may be exercise by like corporations of this State, nor shall they have power to condemn or appropriate private property."

Section 1 of article 17 of that constitution provides that—

"All railroads, canals and turnpikes shall be public highways, and all railroads and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other States. Every railroad company shall have the
3 right with its road to intersect, connect with or cross any other road, and shall receive and transport each the other's passengers, tonnage and cars loaded or empty, without delay or discrimination."

Fifth. Section 3 of an act passed by the General Assembly of the State of Arkansas, entitled "An act in relation to certain railroads," approved March 16, 1881 (Laws of Arkansas, 1881, page 83), provides—

"That every railroad corporation incorporated under the laws of this State, whose road is wholly, or in part, constructed and operated, is hereby authorized to sell, lease or otherwise dispose of the whole or any part of its road, ways, and rights of way, with the franchises thereto belonging, and its other property, to any connecting railroad company, or to any railroad corporation now or hereafter organized under the laws of this or any other State, upon such terms and conditions as may be agreed upon by the board of directors of said corporations, and ratified by a two-thirds vote of the issued capital stock thereof, and to receive the bonds or stock of the purchasing corporation in whole or in part payment of such purchase, and corporations may be formed for the purpose of purchasing or leasing the whole or any part of any railroad, and such purpose or object shall be stated in articles of association, which shall be executed and filed in the office of the secretary of state, the same to be as near as may be in accordance with section 4918 of Gantt's Digest. All shares of stock issued in payment of such purchase shall be deemed to be full-paid shares, and the number and amount of shares so to be issued shall be stated in the aforesaid articles of association, and said articles shall be otherwise altered, if necessary, so as to conform to the facts."

4 Section 5 of the same act provides that—

"Any railroad company incorporated by, or under the laws of any other State, and having a line of railroad built, or partly built, to or near any boundary of this State, and desiring to continue its line of railroad into or through this State, or any branch thereof, may, for the purpose of acquiring the right to build its line of railroad, lease, or purchase, the property rights, privileges, lands, tenements, immunities and franchises of any railroad company organized under the laws of this State, which said lease or purchase shall carry with it the right of eminent domain held and acquired by said company at the time of lease or sale, and thereafter hold, use, maintain, build, construct, own and operate the said railroad so leased or purchased as fully and to the same extent as the

company organized under the laws of this State might or could have done; and the rights and powers of such company, and its corporate name, may be held and used by such foreign railroad companies as will best subserve its purpose, and the building of said line of railroad; but before any such lease or sale shall be made, by any company organized under the laws of this State, two-thirds in amount of the capital stock issued shall, at a meeting of the stockholders thereof—of which sixty days' notice shall be given in some newspaper published at the city of Little Rock, and in such other papers published elsewhere as the president and directors of said company may direct, consent thereto—and any railroad company organized under the laws of any State, and having a line of railroad built, or partly built, to any boundary of this State, and desiring to continue its line of road, or any branch thereof, into or through this State, is hereby authorized and empowered so to do, when it shall have acquired by lease or purchase, the corporate rights, privileges and franchises
5 of any railroad corporation, in the manner herein provided, formed under the laws of this State, and such railroad company, upon filing a certified copy of its articles of incorporation, or the special act incorporating the same, shall have, possess, and enjoy all the rights, powers, privileges, franchises and immunities belonging to railroad corporations formed under the general laws of this State, which are not in conflict with the constitution or laws of this State; but nothing herein contained shall interfere with, or abridge the right of any railroad corporation acquired under section 4942 of Gantt's Digest. * * * In all other matters said foreign railroad company shall be subject to all the provisions of all acts in relation to railroads, the liabilities and forfeitures thereby imposed, and may sue and be sued in the same manner as other railroad corporations, and subject to the same service of process, and shall keep an office or offices in said State, as required by section 11 of article 12 of the constitution of this State, and an agent, or agents upon whom process may be served, with the like force and effect as is provided for the service of process in section 2 of this act."

The provision for the service of process in section 2 of said act reads as follows:

"Service of process on the officer or agent of such railroad corporation, in the manner provided by law for the service of process on railroad corporations organized under the laws of the State, shall be deemed to be a sufficient service on such corporation, its officers, agents and attorneys, as though personal service had been made on such corporation, its officers, agents and attorneys. And, provided further, that no such corporation shall do any business in this State except while it maintains therein one or more known places of business, and authorized agent or agents, upon which process may be served."

6 Sixth. At the time of the accident complained of the plaintiff in error owned and operated the railroad from the southern border of the State of Missouri to Fort Smith, in the State of

Arkansas, in connection with its original line from Monett to the Missouri border, and these roads formed and were operated as a continuous line of railroad from Monett to Fort Smith. That portion of this continuous line of railroad which was situated in Arkansas had been built by corporations organized and incorporated under the laws of that State. In the year 1882 the St. Louis & San Francisco Railway Co. purchased from these Arkansas corporations, under the act of March 16, 1881, the railroad extending from the southern border of Missouri to Fort Smith, Ark., and all the railways, constructed and unconstructed, and all the roads, franchises, and property which these Arkansas corporations had. These Arkansas corporations have since maintained their separate organizations as corporations of that State, but have operated no railroads. From the time of this purchase to the present time the plaintiff in error has operated this continuous line of railroad from Monett, Missouri, to Fort Smith, Arkansas, and has owned all the rolling stock and other appurtenances used upon this railroad

Seventh. An act of the General Assembly of the State of Arkansas entitled "An act to prohibit foreign corporations from operating railroads in this State," approved March 22, 1887 (Laws of Arkansas for 1887, page 110), provided as follows:

"SECTION 1. That hereafter it shall not be lawful for any citizen or corporation of any other State or country either to build, lease, maintain or operate a railroad within this State, and all laws or parts of laws which authorize or permit any citizen or corporation of any other State or country either to build, lease, own, maintain or operate a railroad within this State are hereby repealed.

SEC. 2. Any person, company or corporation of any other State or country which now has, owns, controls, maintains or operates any railroad or parts of railroad within this State may within thirty days from the passage of this act organize a corporation under and in conformity with the laws of this State and obtain a charter therefor, as now provided by law and may execute such conveyance as will vest the title to so much of its railroad as is in this State in such corporation of this State.

SEC. 3. If any such person, company or corporation shall fail to obtain a charter of incorporation within this State and to vest the title to its railroad within this State in the State corporation so formed within said thirty days after the passage of this act, it shall be unlawful for it to run or move any train upon any part of its railroad that is within this State. It shall be the duty of the governor at the expiration of said period of thirty days to make enquiry and if he find that any railroad in this State is being built or operated by any person or corporation of any other State or country he shall direct the attorney general to bring an action to restrain and prevent such building and operation of such railroad. The attorney general shall at once file a bill or information in the name of and for the State in the chancery court of Pulaski county, which for this purpose is vested with jurisdiction throughout the State, stating such

failure and that said railroad is being built or operated by some other than a corporation or citizen of this State.

SEC. 4. To such bill or information no defendants need be named, but if the attorney general knows the names of any person engaged in building or operating such railroad in any capacity, he may name such persons as defendants. On filing such bill or information the court shall make an order restraining all persons named or unnamed, from further building or assisting to build, operating or assisting to operate said railroad, and from running or assisting to run trains thereon, and shall enforce obedience by process of contempt.

8 Service of a copy of such order upon any person shall render him amenable thereto, and any one disobeying such order shall be fined not more than ten thousand dollars and be imprisoned until the fine and costs are paid.

SEC. 5. If a corporation is not formed under the laws of this State and vested with title to such railroad, or if such company does not proceed to operate said railroad within thirty days after such restraining order is granted, the governor shall take possession of such railroad on behalf of the State, and having given twenty days' notice, shall lease said railroad to the highest bidder for the term of five years to the person or corporation, being a citizen or corporation of this State and the best bidder, and which shall obligate itself to operate said railroad as an independent road.

SEC. 6. Any corporation formed under the laws of this State and chartered thereby, may consolidate with any corporation of any adjoining State in the manner now provided by law, but such consolidated corporation shall become, be and remain a corporation of this State and amenable to its laws and courts. And no such consolidation shall be effected except between corporations, the union of whose roads will make a continuous line, nor shall any such consolidated company, owned, controlled, operate, lease, purchase or consolidate with any parallel or competing line.

SEC. 7. This act shall take effect and be in force from and after its passage."

Approved March 22, 1887.

9 Eighth. An act passed by the General Assembly of the State of Arkansas entitled "An act relating to the consolidation of railroad companies and the purchasing, leasing, and operation of railroads, and to repeal sections one, two, three, four, and five of an act entitled 'An act to prohibit foreign corporations from operating railroads in this State,' approved March 22, 1887," approved March 13, 1889 (Laws of Arkansas, 1889, page 43), provided as follows:

"SECTION 1. That sections one, two, three, four and five of an act entitled, 'An act to prohibit foreign corporations from operating railroads in this State,' approved March 22, 1887, be and the same are hereby repealed.

SEC. 2. Any railroad company in this State, existing under general or special laws, may sell or lease its road, property and fran-

chises to any other railroad company duly organized and existing under the laws of any other State or Territory, whose line of railroad shall so connect with the leased or purchased road by bridge, ferry or otherwise, as to practically form a continuous line of railroad, and any railroad company in this State existing under general or special laws, may buy or lease, or otherwise acquire, any railroad or railroads, with all the property, rights, privileges and franchises thereto pertaining, or buy the stock and bonds, or guarantee the bonds of any railroad company or companies incorporated or organized within or without this State whenever the roads of such companies shall form in the operation thereof a continuous line or lines. Provided, that before any such lease or sale is valid, it must be approved and ratified by persons holding or representing two-thirds of the capital stock of each of such companies respectively, at a stockholders' meeting called for that purpose; and any railroad company existing under the general or special laws of any other State or Territory may buy or lease
10 or otherwise acquire, any railroad or railroads, the whole or part of which is in this State, with all the rights, privileges and franchises thereto pertaining, or buy the stock and bonds, or guarantee the bonds of any railroad company incorporated or organized under the laws of this State, whenever the roads of such companies shall form in the operation thereof a continuous line or lines. Provided, that the road so purchased shall not be parallel or competing with the purchasing road; and any railroad company existing under the laws of any other State or Territory, may extend and construct its railroad into or through this State. Provided, further that any agreement of any company existing under the general or special laws of this State, or of any other State or Territory, to lease or buy a railroad and appurtenances, or to buy the stock or bonds, or guarantee the bonds of any railroad company incorporated and organized within this State, heretofore executed by the proper officers of such companies and ratified by the companies parties thereto, by the assent of persons holding two-thirds of the capital stock in each of such companies, expressed at a meeting of such stockholders called for that purpose, shall be taken and held to be binding from the date of its execution. Provided, further, that nothing in the foregoing provisions shall be held or construed as curtailing the right of State or counties through which said consolidated, leased or purchased road or roads may be located, to levy and collect taxes upon the same and the rolling stock thereof, *pro rata*, in conformity with the provisions of the laws of this State upon that subject. Provided, further, that before any railroad corporation of any other State or Territory shall be permitted to avail itself of the benefits of this act, or any part thereof, such corporation shall file with the secretary of state of this State a certified copy of its articles of incorporation, if incorporated under a general law of such State or Territory or a certified copy of the statute laws of such State or
11 territory incorporating such company, where the charter of such railroad corporation was granted by special statute

of such State; and upon the filing of such articles of incorporation or such charter, with a map and profile of the proposed line and paying the fees prescribed by law for railroad charters, such railroad company shall, to all intents and purposes, become a railroad corporation of this State, subject to all of the laws of the State now in force or hereafter enacted, the same as if formally incorporated in this State, anything in its articles of incorporation or charter to the contrary notwithstanding, and such acts on the part of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation, and, provided, further, that every railroad corporation of any other State, which has heretofore leased or purchased any railroad in this State, shall, within sixty days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the secretary of state of this State, and shall, thereupon, become a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding, and in all suits or proceedings instituted against any such corporation, process may be served upon the agent or agents of such corporation or corporations in this State, in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this State, organized and existing under the laws of this State.

SEC. 3. Any foreign corporation which has heretofore constructed, purchased, leased or acquired or now operates any railroad in this State, shall within sixty days after the passage of this act comply with the provisions thereof, by filing a copy of its articles of incorporation or of the special act of the legislature incorporating
12 such company in the office of the secretary of state of this State, and for every day which any such company shall fail to comply with the provisions of this act, it shall pay a penalty of one thousand dollars, which penalty may be recovered by the district attorney in a civil action instituted in the proper court in any county through which such railroad or any part thereof so owned, purchased, leased, acquired or operated by such foreign company may be located.

SEC. 4. This act shall take effect and be in force from and after its passage. Approved March 13, 1889."

Ninth. On May 6, 1889, the St. Louis & San Francisco Railway Co. filed with the secretary of state of the State of Arkansas a duly certified copy of its articles of incorporation under the laws of Missouri, as required by said act of March 13th, 1889, and has never been otherwise incorporated or organized under the laws of the State of Arkansas.

Tenth. The plaintiff in error properly and seasonably raised the objection in the circuit court that that court had no jurisdiction of this action on the ground that the plaintiff in error was not a citizen of the State of Arkansas, but was a citizen of the State of Missouri, of which State the defendant in error was also a resident and citizen, but the plaintiff in error waived its personal privilege of being sued in the district of which it was an inhabitant. The question raised by that objection has been, by proper exception to the

ruling below and assignment of error, presented to this court for determination.

And the said United States circuit court of appeals further certifies that to the end that it may properly decide this and other questions arising in this case which are duly presented by exceptions and assignments of error properly taken and filed the said court
13 desires the instruction of the Supreme Court of the United States upon the following questions:

1st. In view of the provisions of the act of the General Assembly of Arkansas approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of State of Arkansas and continuing to operate its railroad through that State, become a corporation and citizen of the State of Arkansas?

2nd. In view of the provisions of the act of the General Assembly of Arkansas approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of State of Arkansas and continuing to operate its railroad through that State, become a citizen of the State of Arkansas so as to give the circuit court of the United States for the western district of Arkansas jurisdiction of this action, in which the defendant in error was and is a citizen of the State of Missouri?

3rd. In view of the provisions of the act of the General Assembly of Arkansas approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of State of Arkansas and continuing to operate its railroad through that State, become a citizen of the State of Arkansas, so as to give the circuit court of the United States, for the western district of Arkansas jurisdiction of this action in which defendant in error was and is a resident and citizen of the State of Missouri and the cause of action accrued in the State of Missouri and arose
14 from an accident that resulted from the operation of the railroad of the company in that State?

4th. In view of the facts hereinbefore set forth, did the circuit court of the United States for the western district of Arkansas have jurisdiction of this action?

In witness whereof the undersigned judges, holding the said United States circuit court of appeals for said eighth circuit, have hereto set their hands this twenty-ninth day of May, A. D. 1893, at St. Paul, Minnesota, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals and by the clerk of said court be duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL.
WALTER H. SANBORN.
AMOS M. THAYER.

15 UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of The St. Louis and San Francisco Railway Company, plaintiff in error, *vs.* Etta James was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the said Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Paul, Minnesota, this twenty-ninth day of May, A. D. 1893.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

16 [Endorsed:] (Original.) St. Louis and San Francisco Railway Company, plaintiff in error, *vs.* Etta James. In error to the circuit court of the United States for the western district of Arkansas. Questions certified for instruction Supreme Court U. S. by the U. S. circuit court of appeals for the eighth circuit. Filed May 29, 1893. John D. Jordan, clerk.

17 In the Supreme Court of the United States.

THE ST. LOUIS & SAN FRANCISCO RAILWAY, Appellant, }
vs.
ETTA JAMES, Appellee. }

Stipulation.

It is hereby stipulated and agreed by the parties to this action that there is diminution of the record in this cause, in this, to wit, that the record does not show the issuance and service of process upon the defendant at the commencement of the action in the trial court, and it is, with the permission of the court, now stipulated that said record may be considered amended as upon certiorari so as to show that a summons in due form was issued when the complaint was filed in the trial court and returned showing proper service upon Charles Hall, the agent of the defendant at Ft. Smith, Ark.

A. T. BUTTON,
A. B. BROUNE,
E. D. KENNA,
Att'ys for Plaintiff in Error.

Writ served May 3, '90.

FRANK W. HACKETT,
Att'y for Def't in Error.

[Endorsed:] The St. Louis & S. F. R'y Co. *vs.* Etta James. Stipulation.

[Endorsed:] Case No. 15,333. Supreme Court U. S., October term, 189–. Term No., 539. The St. Louis & San Francisco R'y Co. *vs.* Etta James. Stipulation as to amendment of record.

[Stamped:] Office Supreme Court U. S. Filed Oct. 22, 1894. James H. McKenney, clerk.

Endorsed on cover: Case No. 15,333. U. S. circuit court of appeals, 8th circuit. Term No., 539. The St. Louis & San Francisco Railway Company, plaintiff in error, *vs.* Etta James. Filed June 12th, 1893.

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

MAY TERM, A. D. 1893.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Plaintiff in Error,
vs.
ETTA JAMES, Defendant in Error.
} No. 238.

In error to the circuit court of the United States for the western district of Arkansas.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this 11th day of January, 1895, hereby certifies that upon the record on file in said court in the case wherein The St. Louis and San Francisco Railway Company is plaintiff in error and Etta James is defendant in error, which is now pending before this court upon a writ of error duly issued to the United States circuit court for the western district of Arkansas, the following facts, in addition to the facts certified by our certificate to the Supreme Court of the United States, dated the 29th day of May, A. D. 1893, are made to appear by the record in this court, and we request that our certificate be amended so that the statement following may be inserted therein at the close of the ninth paragraph on the twelfth page of our former certificate. The facts are these:

That after the said St. Louis and San Francisco Railway Company filed the certified copy of its articles of incorporation under the laws of Missouri, as required by said act of the legislature of Arkansas of March 13, 1889, the line of railroad between Monett, Missouri, and Fort Smith, Arkansas, was operated as one line of railroad. If the St. Louis and San Francisco Railway Company became a corporation of the State or Arkansas by filing the certified copy of its articles of incorporation under the laws of Missouri with the secretary of state of the State of Arkansas, the stockholders and officers of the Missouri corporation and of the Arkansas corporation were identical. The management and operation of said line from Monett, Missouri, to Fort Smith, Arkansas, was carried on in the name of "the St. Louis and San Francisco Railway Company" alone. All the operating expenses of such line were paid from its earnings, which went into one treasury; and the decedent, Matthew James, was at the time of his death in the discharge of his duty as a fireman on an engine running on said line from Monett, Missouri, to Fort Smith, Arkansas.

In witness whereof the undersigned, judges holding the said United States circuit court of appeals for said eighth circuit, have

hereto set their hands this eleventh day of January, A. D. 1895, at St. Louis, Missouri, and ordered and directed that the foregoing certificate be filed in said circuit court of appeals and by the clerk of said court be duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL.
WALTER H. SANBORN.
AMOS M. THAYER.

UNITED STATES OF AMERICA, *Eighth Circuit,* } ss:

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing amendment to the certificate, dated May 29th, A. D. 1893, in the case of The St. Louis and San Francisco Railway Company, plaintiff in error, *vs.* Etta James, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said amendment to the said certificate is by me forwarded to the said Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, this eleventh day of January, A. D. 1895.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] St. Louis & San Francisco Railway Company, plaintiff in error, *vs.* Etta James. In error to the circuit court of the United States for the western district of Arkansas. Amendment to certificate to Supreme Court of United States by United States circuit court of appeals for the eighth circuit. Filed Jan. 12, 1895. John D. Jordan, clerk.

[Endorsed:] Case No. 15,333. Supreme Court U. S., October term, 1894. Term No., 539. The St. Louis and San Francisco Railway Co., P. E., *vs.* Etta James. Amendment to certificate sent up by U. S. circuit court of appeals.

[Stamped:] Office Supreme Court U. S. Filed Jan. 21, 1895. James H. McKenney, clerk.

Office Supreme Court, U. S.
FILED.
OCT 23 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1894.

ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
Plaintiff in Error,
vs.
ETTA JAMES,
Defendant in Error.

No. ~~339~~ 242

MOTION TO ADVANCE.

Now comes the defendant in error, by her attorney, Frank W. Hackett, and moves the Court to advance this cause for hearing.

Etta James, defendant in error, recovered a judgment in the Circuit Court of the United States for the Western District of Arkansas, as widow and sole heir of her husband, a fireman in the railroad's employ, for its negligence in maintaining a switch-target near its track at Monett, Missouri, whereby he was struck and killed. He was a citizen of Missouri, and died in that State. The widow is a citizen of Missouri.

The United States Court of Appeals, Eighth Circuit, certify the facts, including the history of the incorporation and organization of the railroad, its obtaining control of roads in Arkansas, and operating a continuous line from Monett to Fort Smith, Arkansas.

They ask the instruction of this Court as to whether the Circuit Court had jurisdiction because of the citizenship of the parties.

This is the sole question at issue here.

The importance of an early determination of this question, which is likely to affect a class of cases, is a reason why the motion be granted under the provisions of Rule 32.

FRANK W. HACKETT,
For Defendant in Error.

To A. T. BRITTON AND A. B. BROWNE,
Counsel for Plaintiff in Error.

Sirs: Please take notice that I shall submit the above motion to the Court on Monday, 29th October, 1894.

FRANK W. HACKETT.

Service admitted October 5, 1894.

A. T. BRITTON,
A. B. BROWNE,
Of Counsel for Plaintiff in Error.

The importance of an early determination of this question, which is likely to affect a class of cases, is a reason why the motion be granted under the provisions of Rule 32.

FRANK W. HACKETT,
For Defendant in Error.

To A. T. BRITTON AND A. B. BROWNE,
Counsel for Plaintiff in Error.

Sirs: Please take notice that I shall submit the above motion to the Court on Monday, 29th October, 1894.

FRANK W. HACKETT.

Service admitted October 5, 1894.

A. T. BRITTON,
A. B. BROWNE,
Of Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
NOV 26 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY,
PLAINTIFF IN ERROR,
v.
ETTA JAMES.

No. 539.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

GEO. R. PECK,
A. T. BRITTON,
E. D. KENNA,
A. B. BROWNE,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1894.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, PLAINTIFF IN ERROR,

v.

ETTA JAMES.

No. 539.

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Plaintiff in Error.

STATEMENT.

This certificate presents the inquiry whether the U. S. Circuit Court for the Western District of Arkansas, wherein the action was originally brought, had jurisdiction thereover, same being based wholly on the assumed diverse citizenship of the parties thereto. The substantial facts recited therein are—

1st. Plaintiff in error was organized and incorporated under the laws of Missouri in 1876, and operates a rail-

road in that State, from Monett to the southern boundary thereof.

2. Defendant in error was a citizen and resident of Missouri when this action was brought.

3. The action was commenced on December 24, 1892, to recover damages for the Company's alleged negligence in improperly maintaining a switch target at Monett, Missouri, and by which her husband was struck and killed in July, 1889.

4. In 1882 plaintiff in errror purchased and has since operated a line of railroad in Arkansas connecting at the boundary thereof with its line in the State of Missouri and forming a continuous line from Monett, in Missouri, to Fort Smith, in Arkansas. Such Arkansas railroad was originally constructed by corporations, organized under the laws of that State, which have since maintained their separate organizations but have operated no railroads.

5. By an Act approved March 13, 1889, the State of Arkansas provided (*inter alia*) and subject to excessive penalties for failure to comply therewith—

"That every railroad corporation of any other State, "which has heretofore leased or purchased any railroad "in this State, shall, within sixty days from the passage "of this act, file a duly certified copy of its articles of "incorporation or charter with the Secretary of State of "this State, and shall, thereupon, become a corporation "of this State, anything in its articles of incorporation or "charter to the contrary notwithstanding, and in all suits "or proceedings instituted against any such corporation, "process may be served upon the agent or agents of such "corporation or corporations in this State, in the same "manner that process is authorized by law to be served "upon the agents of railroad corporations in this State, "organized and existing under the laws of this State." (Rec. 7.)

6. May 6, 1889, plaintiff in error filed with the Secretary of State of Arkansas certified copy of its articles of incorporation under the laws of Missouri as thus required, " and has never been otherwise incorporated or organized " under the laws of the State of Arkansas " (Rec. 7).

7. By demurrer and subsequent exceptions plaintiff in error duly and seasonably raised objection to the jurisdiction of the trial Court, and the cause is now pending in the Circuit Court of Appeals on its writ of error to review therein the adverse judgment of the trial Court (Rec. 7, 8).

ARGUMENT.

I.

If the jurisdiction of the trial court is to be sustained, we will see upheld the anomalous case of a citizen of Missouri suing in the United States courts another citizen of Missouri for a cause of action arising in and maintained solely by reason of the statutes of Missouri.

Under the Constitution of the United States the only ground upon which a cause of action like this can be tried in the Federal Courts is that of diverse citizenship.

Certainly the framers of the Constitution did not intend that Congress should ever have the right by any form of enactment to confer upon the Federal Courts jurisdiction of a cause of action between citizens of the same State. The constant policy of Congress has been to limit, not to extend, the jurisdiction of such courts.

In the opinion of the learned judge who sustained the jurisdiction of the trial court, all sight seems to have been lost of the fact that the parties were citizens of the same State.

It is undoubtedly true that the Missouri corporation might become a corporation of the State of Arkansas *so far as its doings and its property in that State are concerned.* This is the effect of the decisions of this Court in

Railroad v. *Wheeler*, 1 *Black*, 286;
R.R. Co. v. *Whiton*, 13 *Wall.* 270;
R'y Co. v. *Vance*, 96 *U. S.* 450;
R'y Co. v. *Alabama*, 107 *U. S.* 581;
Pennsylvania R. Co. v. *St. A. & T. H. H. R.R.*, 118 *U. S.* 391;
Goodlett v. *R.R. Co.*, 122 *U. S.* 391;
Graham v. *R.R. Co.*, 118 *U. S.* 161;
Clark v. *Bernard*, 108 *U. S.* 437;
Uphoff v. *R.R. Co.*, 5 *Fed. Rep.* 545;
Stout v. *R.R. Co.*, 3 *McCrary*, 1, 8 *Fed. Rep.* 794.

It is unnecessary for us to consider the question whether the Arkansas Act relied upon by plaintiff was not a mere subterfuge to deprive the Federal Courts of jurisdiction over causes of action against foreign corporations. Giving to it the fullest effect which any of the decisions cited (*James* v. *R.R. Co.*, 46 *Fed. Rep.* 47) would warrant, the law can only be considered at most as making the St. Louis & San Francisco Railway Company a corporation of Arkansas *as to those things done in that State.*

The identity of the corporation is not lost. It remains a separate and foreign corporation as to those things done outside the State, and no law of the State of Arkansas could make the acts of a foreign corporation done in the State of its creation the acts of a being created by it. The so-called "adoption" of foreign corporations is a fiction, which is in law dispelled when the boundaries of the State are passed. The legislature might as well declare that the natural parents of a child were not such in fact

as to enact that the acts done by a foreign corporation in its own State were in law the acts of the adopted corporation. It is only for convenience and for the better control of corporations that States are permitted to treat property within the State belonging to a foreign corporation as the property of a domestic corporation, and their control ends with the property and things done in the State.

Railroad v. *Harris*, 12 *Wall.* 65.
Central Trust Co. v. *R'y Co.*, 41 *Fed. Rep.* 551.
Beach on Private Corporations, *Sec.* 336.

It *Stout* v. *R.R. Co.* (8 *Fed. Rep.* 794) the defendant, an Iowa corporation, had complied with an act of the legislature of Nebraska substantially the same as the Arkansas act. The plaintiff was a citizen of Nebraska, and sought to obtain jurisdiction over the Iowa corporation by the service of process upon the agent of the defendant having an office in the State of Nebraska.

McCrary, C. J., held that the service was not good; that the plain effect of the statute was to constitute the railroad company, for jurisdictional purposes, a Nebraska corporation, in respect to all its transactions within that State, and that the agents of the company in such State were the agents of the Nebraska corporation, *and not the agents of the Iowa corporation.*

If citizens of Missouri can go to Arkansas and sue for injuries occurring in Missouri, then citizens of Arkansas can come to Missouri and sue for injuries occurring in Arkansas. In this way every citizen in the State of Missouri and every citizen in the State of Arkansas can prosecute his claim against the defendant corporation in the Federal Courts. As similar laws are in force in adjacent States traversed by defendant's line of railway, and as most all of the large railroad corporations in the West and South-

west operate lines in various States in which laws similar to the Arkansas act prevail, it follows that every case brought against a railroad company operating in more than one State can be instituted in or removed to the Federal Courts, if the jurisdiction of this case is to be sustained.

There is another reason for denying the jurisdiction of the trial court.

A corporation, for the purpose of Federal jurisdiction, is regarded as a citizen of the State where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted. "There is a presumption of law which is conclusive." (*R.R. Co.* v. *Harris*, 12 *Wallace*, 65; *R.R. Co.* v. *Letson*, 2 *How.* 497; *Marshall* v. *R.R. Co.*, 16 *Howard*, 329.)

And it is indisputable that one cannot be, at one and the same time, a citizen of two States. (*Law of Citizenship* (*Webster*), 114; *Westlake's Private International Law*, 21; *Field's International Law*, 1 0.)

It has been uniformly held by the Supreme Court of the United States that a corporation is not a citizen within the meaning of the "immunity" clause of the Constitution. (*Paul* v. *Virginia*, 8 *Wallace*, 168.) Federal Courts acquire jurisdiction over cases to which corporations are parties, by the presumption that all stockholders are citizens of the State of its creation. (*R.R. Co.* v. *Harris*, *supra*.)

Giving, therefore, to the Arkansas act full effect, and to the declaration that defendant was an Arkansas corporation, does not make it a citizen of that State, for it is well settled that defendant cannot be a citizen of two States; and certainly it will not be held to be a citizen of a State other than the one which originally created it and within whose jurisdiction are located its officers and principal lines of railway.

It is submitted that the Arkansas act cannot have the effect given to it by the judgment of the trial court, and that the statutes of the United States cannot be construed as making it possible for the Federal Courts to have jurisdiction of all cases where the corporation operates lines in more than one State and the amount is sufficient to confer jurisdiction, and where the opposite party is a citizen of the same State with the original corporation.

II.

The third question certified is:

"3rd. In view of the provisions of the act of the General Assembly of Arkansas, approved March 13, 1889, did the St. Louis and San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the Secretary of State of Arkansas and continuing to operate its railroad through that State, become a citizen of the State of Arkansas, so as to give the Circuit Court of the United States for the Western District of Arkansas jurisdiction of this action, in which defendant in error was and is a resident and citizen of the State of Missouri, and the cause of action accrued in the State of Missouri and arose from an accident that resulted from the operation of the railroad of the Company in that State?"

The fourth question certified is:

"In view of the facts hereinbefore set forth, did the Circuit Court of the United States for the Western District of Arkansas have jurisdiction of this action?"
(Rec. 8.)

This Court is therefore asked to determine broadly (1) whether, *upon the facts*, diverse citizenship existed, and (2)

whether, in any view, the trial Court had jurisdiction to hear and determine the action.

In *Memphis & Charleston R.R. Co.* v. *Alabama* (107 U. S. 581) it appeared that said Company was originally chartered by Tennessee, and *thereafter* incorporated by an Act of Alabama and authorized to construct a railroad in *that* State. The question was whether a suit brought in Alabama "to recover the amount of a county tax "assessed upon its property" by a county of that State could be removed by the Company into the U. S Circuit Court for the Northern District of Alabama on the ground that it was a citizen of Tennessee, and plaintiff a citizen of Alabama. This Court held that it could not be so removed, observing (p. 585):

"The defendant, being a corporation of the State of "Alabama, has no existence in this State as a legal entity "or person, except under and by force of its incorpora- "tion by this State; and although also incorporated in "the State of Tennessee, must, *as to all its doings within "the State of Alabama*, be considered a citizen of "Alabama, which cannot sue or be sued by another "citizen of Alabama in the Courts of the United States." (*Ohio & Mississippi Railroad Co.* v. *Wheeler*, 1 Black. 286; *Railway Company* v. *Whitton*, 13 Wall. 270, 283.)

Assuming the law of Arkansas, *supra*, created plaintiff in error a corporation of *that* State, having existence therein separate from the Missouri corporation, it is manifest the Arkansas corporation did not commit the alleged tort here sued on, and in that view there was and is no cause of action against *that* corporation, and no case within the jurisdiction of the Circuit Court. And assuming that there is any relationship between the Arkansas and Missouri corporations (and they have common stock, common management, and a common treasury), it then results that

he Missouri corporation is so far a party defendant as to destroy the diversity of citizenship necessary to maintain the action in a Federal Court. That diversity must exist as between *all* the plaintiffs on the one part as against *all* the defendants on the other. Yet in *Muller* v. *Dows* (94 U. S. 444, 445) this Court said :

" A suit may be brought in the Federal Courts by or
" against a corporation, but in such a case it is regarded
" as a suit brought by or against the stockholders of the
" corporation ; and, for the purposes of jurisdiction, it
" is conclusively presumed that all the stockholders are
" citizens of the State which by its laws created the cor-
" poration."

If, then, this plaintiff in error is a corporation jointly of *both* the States of Missouri and Arkansas, then it must be conclusively presumed that its stockholders are citizens of *both* States, and upon the underlying principle *supra*, on which Federal jurisdiction over corporations is sustained, it is manifest that the Missouri stockholders of this joint corporation are citizens of the same State as the original plaintiff herein, and hence the Federal Courts can have no jurisdiction over this action.

Thus upon either assumption—*i. e.*, an exclusive Arkansas corporation, or the joint incorporation in each State—there is (1) no cause of action of possible existence here over which any Court has jurisdiction as against the former, and (2) no diverse citizenship sufficient to maintain Federal jurisdiction as against the latter.

The act of March 3, 1887, as amended by the act of August 13, 1887 (25 Stats. ch. 866, p. 433), provides (sec. 1.)—

" but where the jurisdiction is founded only on the fact
" that the action is between citizens of different States,

" suit shall be brought only in the district of the residence " of either the plaintiff or the defendant."

The controversy is properly between the Missouri corporation and the plaintiff, who was a citizen and resident of the same State. There the alleged tort was committed; there the corporation liable therefor is to be found. The attempt by defendant in error to go outside her own State and find some *other* corporation as an assumed defendant and assume *its* liability in order to create a case of Federal cognizance is wholly opposed to the language, the intention, and the policy of the Federal statute.

To uphold jurisdiction here will permit this plaintiff in error to remove into the Federal Court every case brought against it. The principle which can recognize the right of defendant in error to proceed in a Federal Court must have similar operation in favor of the Company. Such a result was never contemplated by Congress. And whilst the judiciary is not responsible for the consequences of legislation, yet, where the suggested construction of any statute leads to results either opposed to the apparent policy of all legislation on that particular subject or which are absurd, the Courts may well seek some other interpretation of the law, which harmonizes with the apparent legislative intent or avoids consequences of mischievous or absurd effect.

Respectfully submitted.

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Office Supreme Court U. S.
FILED.
OCT 7 1895
JAMES H. McKENNEY,
CLERK.

242

....IN THE....

SUPREME COURT OF THE UNITED STATES.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
ETTA JAMES,
DEFENDANT IN ERROR.

No. 889.

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

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....IN THE....

SUPREME COURT OF THE UNITED STATES.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
ETTA JAMES,
DEFENDANT IN ERROR.

No. 539.

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

The questions upon, which the instructions of this court have been requested, seem to us properly reducible to less than four terms. When an opinion is ex-

pressed upon the following questions, we believe every doubt suggested in the certificate will be resolved.

FIRST.

WERE THE PARTIES TO THIS ACTION CITIZENS OF DIFFERENT STATES?

SECOND.

DID THE PLEADINGS AND EVIDENCE DISCLOSE A CAUSE OF ACTION AGAINST THE DEFENDANT or, to put it differently, WAS THE WRONG COMPLAINED OF COMMITTED BY THE DEFENDANT?

The jurisdiction of the court being maintainable solely on the ground of diversity of citizenship, and the plaintiff being admittedly a citizen of Missouri, it only remains to ascertain whether the defendant was a citizen of some other State. If it was, the court had jurisdiction. If not, it had not. The plaintiff attempted to bring an action against a corporation of the State of Arkansas, process was served as required to obtain jurisdiction of a domestic railway corporation and no question was raised as to the sufficiency of the proceedings to obtain jurisdiction of such a corporation. The sole contention was the non-existence of

such a corporation of Arkansas as the defendant. It would not oust the jurisdiction to show that there existed in some other State a corporation precisely identical in name with the defendant. It is the privilege of a plaintiff to select the defendant against whom he will assert a claim and the prerogative of the court to say, (1) whether the defendant chosen by the plaintiff is in court, and, (2) whether the alleged cause of action is maintainable against the defendant thus brought to answer. No attack having been made upon the efficacy of the proceedings to bring an Arkansas corporation into court, time need not be occupied in the collateral inquiry whether by some mistake, a party, not sued or served with notice to appear, has come forward and crowded into the seat of the defendant against whom alone the plaintiff asserts a claim. If there is an Arkansas corporation of the defendant's name, that corporation is the defendant, and consequently the defendant is a citizen of Arkansas.

Counsel for the defendant seem unable or unwilling to distinguish between the questions whether the trial court had jurisdiction of the parties by reason of diverse citizenship and whether the defendant was liable upon the claim set up. These are totally distinct issues which arose *successively* and *not concurrently*. The power to determine the latter depends absolutely on a previous decision of the former in the affirmative,

while the decision of the latter can in no wise affect the consideration of the former. If it is determined that the parties to this action are not citizens of different States, that settles the jurisdictional question. If it should be concluded that they are of diverse citizenship, the question whether plaintiff has a cause of action against the defendant remains to be considered, not generally, of course, but only to the extent that the certificate places it before the court. To these questions then in their natural sequence we ask the attention of the court.

FIRST.

WAS A CORPORATION, CREATED BY THE STATE OF ARKANSAS AND KNOWN BY THE NAME OF DEFENDANT, IN EXISTENCE AT THE COMMENCEMENT OF THIS ACTION?

Instead of alleging in the ordinary form that defendant was a corporation of the State of Arkansas, the complaint sets out the method by which it became such a corporation. It was thus disclosed that, prior to March 13, 1889, certain persons, having obtained corporate powers from the State of Missouri, had become the owners of a railroad in the State of Arkansas, and were operating it; that, on that day, the State of Arkansas by law required all foreign corporations, own-

ing railroads in the State, to file a copy of their articles of incorporation with the Secretary of State, within sixty days from that date; and provided that when any one of such corporations had complied with that requirement, it should "thereupon become a corporation of the State of Arkansas, anything in its said articles of incorporation to the contrary notwithstanding." On May 6, 1889, the said railway corporation of Missouri complied with said act by filing with the Secretary of State of Arkansas a copy of its articles of incorporation.

These facts show the defendant to be a corporation created by the State of Arkansas, not, it is true, in the method by which it usually creates corporations, but in a method just as valid. It is exclusively within the power of a State to say in what manner its admitted function of creating corporations shall be exercised, and the method of creating them by adoption has been too often recognized in this forum to admit of dispute. Beginning with R'y Co. v. Harris, 12 Wall 65 and continuing through R'y Co. v. Vance 96 U. S. 450; R'y Co. v. Ala. 107 id 581 and other intermediate cases down to Martin v. R'y Co. 151 id 673, will be found recognitions of this method of bringing corporations into existence. The same term, "create," is found used in these cases when speaking either of the act of the first or the second State. Both create a corpora-

tion, a complete, perfect and new legal entity. The corporation thus created by the action of the second state is just as perfect, complete and new a citizen of the State creating it as if no previous act had taken place elsewhere. This court, speaking in Memphis R'y v. Alabama supra, of the method of creating corporations by adoption, used the exact language of the Arkansas Act when it said that, the whole Act under consideration, (enumerating its provisions) manifested the understanding and intention of the legislature of Alabama that the corporation, upon compliance with its requirements, "was, and should be in law, a corporation of the State of Alabama, although having one and the same organization with the corporation of the same name, previously established by the State of Tennessee." The Arkansas Act says that the doers of a certain thing shall "thereupon become a corporation of" the State of Arkansas. The question whether a certain act creates a corporation is solely one of legislative intent. If the language used specifically, in set terms, creates a corporation, that ends discussion, as it does not lie in the province, either of courts or parties, to deny that the legislature meant what it said. If such set and customary phraseology is not employed, resort must then be had to a consideration of the natural legal effect of the provisions, to ascertain whether the creation of a corporation was intended. (Memphis

R'y v. Ala. supra and Penn. R'y v. R'y 118 U. S. 290.) Here the clear and unmistakable intent was to create "a corporation of the State of Arkansas," for the language leaves nothing to be debated as to the purpose of the lawmakers. It is the very language ordinarily used in acts for incorporation which provide that when persons perform certain acts, they shall "become a corporation" or "shall become a body politic and corporate," etc. The addition of the qualifying phrase "of the State of Arkansas" adds nothing to the *legal effect* of the enactment, as the State of Arkansas has no power to create a corporation of any other State, but it does emphasize the *legislative intent.* As the parties thus empowered to "become a corporation" already constituted a corporation of another State, it seemed prudent in order that there might be no question upon the subject, to say specifically that the corporation it was thus calling into being, was to be a corporation "of this State."

If any doubt could exist as to the legislative intent it is found unmistakably, when the Act is considered in connection with the one which it, in part, repealed and superseded. That Act expressly prohibited foreign corporations from owning or operating railways in the State, and required them at once to organize a domestic corporation and convey to it their property in this State. The first 5 sections of that Act

were repealed but they were superseded by provisions calculated to produce exactly the same result. The foreign corporation might come into the State by way of a purchase or lease but it must file its articles of incorporation and become a domestic corporation. Language could not be more explicit. After the foreign corporation shall have done certain things it "shall to all intents and purposes become a railroad corporation of this State, subject to all the laws of the State now in force or hereafter enacted, the same as if formally incorporated in this State, anything in its articles of incorporation or charter to the contrary notwithstanding, and such acts on the part of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation," and the same sentence contains the provision as to corporations already in the State, requiring them to become corporations of the State. The whole Act taken together shows the determination of the State, that foreign corporations should not own or operate railways within its territory, to be unchanged.

But we do not now understand counsel to dispute the sufficiency of this language to call into existence a new and Arkansas corporation, neither do we understand them to contend as in the court below, that the Missouri corporation having come into the State and purchased a railroad, under laws permitting it to do so, could not thereafter be compelled by the State to exchange its foreign for domestic corporate

status. The answer to that suggestion would be too obvious. If the Missouri corporation understood that it had obtained a vested right, under the laws of the State and Nation, to maintain its standing on the soil of Arkansas as a foreign corporation, with whatever of advantage such position might bestow, it was at liberty to refuse to comply with the law and test its validity in a proper forum. It did nothing of the kind, but complied promptly with the requirements of the Act, so that the State could not thereafter have disputed that there was a St. Louis & San Francisco R'y. of Arkansas, invested anywhere, in or out of Arkansas, with every right which any other Arkansas railroad corporation could assert, and competent to do in Arkansas those things, which, by its laws, are reserved to domestic corporations only, as for instance to exercise the right of eminent domain. Having thus sheltered itself from the penalties of the Act by a perfect compliance, and placed itself where it can successfully claim all the rights of a domestic railway corporation, it is now too late for it either to deny the efficacy of the Act to create those conforming to its terms, domestic corporations, or to assert that by virtue of its legal attitude in the State, it had acquired an inalienable right to remain therein as a foreign corporation, and was therefore exempt from the operation of the law. This court speaking of adopting a corporation al-

ready existing in another State, says that the old corporation does not become a corporation of the adopting Stat "until it does some act which signifies its acceptance of this legislation and its purpose to be governed by it." (Penna. R'y v. R'y supra.) In this instance the corporation already existing elsewhere signified in the very manner provided in the Act, "its acceptance of this legislation and its purpose to be governed by it." An exactly analogous condition is found where a State attempts without right to make changes in the charter of a corporation which it has created. If the corporation accepts either in words or by actions, it cannot be heard afterward to insist that the legislation was an invasion of its constitutional rights.

I. Woods R'y 23; R'y Co. v. Cole 29 O. S. 126.

The defendant may not, by an ostensible acceptance of this Act occupy the status toward the State of a domestic corporation, and, at the same time, litigate with a private citizen, the validity of the legislation which it has obeyed. Finding its articles of incorporation in the proper office as required by law, all persons have the right to deal with the corporation upon the assumption, and to bring it into court in the belief, that it is what it thus publicly proclaims itself to be, a citizen of Arkansas.

"It is well settled * * * * * * that where a party

has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others, not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit.

2. Herman Estop. 1318.

Burlington v. Gilbert, 31 Ia. 356.

Ferguson v. Landram, 5 Bush 230.

The argument of the defendant upon this branch of the case seems to be, first, that the corporation which Arkansas created was such only "so far as its doings and property in that State are concerned," and second, that, as there was a conclusive presumption of law, when Missouri created the original corporation, that its members were citizens of that State, there could be no presumption here that the same persons are citizens of Arkansas, and hence the Arkansas corporation is not a citizen of Arkansas.

The first of these propositions has no place in the discussion of the question of jurisdiction. We are entirely willing to accept the position thus taken as correct and to argue the jurisdictional issue as if the Act had said in terms, that the corporation it was creating was to be a corporation of the State of Arkansas "so far as its doings and property in the State of Arkansas are concerned." What does the clause thus added mean?

Counsel seem to think it restrictive in character, that it is a limiting element, that it makes its subject somewhat less than a corporation. We do not so understand it. The corporation is neither more nor less a corporation because or by reason of this clause. What it does mean, and all that it means, is to indicate the property and business with which the new corporation is invested. When corporations are created by the ordinary methods, provision is made for capital stock subscribed or to be subscribed, the business proposed is stated, and the names of officers who shall launch the new enterprise are given. When a corporation is created by adopting one already existing elsewhere, but having acquired property and engaged in business under license from the adopting State, such new domestic creature comes into being full fledged, with capital stock, stockholders, officers, property, business, agents, employees and servants. The capital stock, stockholders and officers, it may share with the original corporation, but the property, business, agents, employees and servants situated in the adopting State, become at once, by legislative fiat, the sole property, business, agents, employees and representatives of the new corporation. By the Act of legislative adoption the adopted child becomes the heir of all these things. If this is not the case what possible utility can there be in creating such a corporation? If it does not become

the heir of the property within the control of the adopting State, how can it become a joint heir of the capital stock, stockholders and officers in another State? It seems to us that these views result necessarily from the admission that a domestic corporation is created by adopting a corporation already existing in another State. McCrary C. J. [Dundy J. concurring] so held in Stout v. R'y Co. 8 Fed. 794. The property which the St. Louis & San Francisco railway of Missouri, owned and operated in Arkansas before May 6 1889, became, and after that date remained, the property of the corporation of the same name owing its existence to the State of Arkansas. The liability of the latter company to be sued and its capacity to sue, were and are as perfect as those of any other railway corporation of Arkansas. All corporations are such "as to the doings and property" which belong to them, and they are such *to that extent only* in precisely the sense that the defendant is a corporation of the State of Arkansas, "*as to its doings and property in Arkansas.*" But it by no means follows that they can only be sued and jurisdiction obtained over them when the subject of the action is their "property, business or doings." Indeed, a corporation, which has no property at all anywhere, may be sued just as effectually as one which has millions. If summons can be served which will bring the defendant into court, jurisdiction is com-

plete, whether the plaintiff have a cause of action or not. This Arkansas corporation now in court, like all others, may sue and be sued, and when sued must appear and defend. What the result may be of the investigation which the court will make to ascertain if the plaintiff has a just complaint against the defendant, is wholly aside from the question whether the court has jurisdiction of the defendant. Jurisdiction precedes investigation, must have attached before the power to investigate arises, and can in nowise be affected by the result of the trial, which is its exercise. If it is ascertained that no cause of action exists, the jurisdiction of the court will not be surrendered, but exerted to adjudicate that fact conclusively for the benefit of the defendant. Suppose that two men, with exactly the same name, live one in Missouri the other in Arkansas, and the citizen of Missouri should be sued in a Federal court of that State, by a citizen of some other State, on a contract made by his Arkansas namesake. Proper service of process would compel the Missouri man to appear and defend, and he would be entitled *not to have the cause dismissed for want of jurisdiction*, but to a binding adjudication that *the plaintiff had no cause of action against him*, and must pay him the costs incurred in making his defense. So here the Arkansas corporotion may not disregard the process of the court, but must appear and defend. If it

shall appear finally that the plaintiff has no cause of action against it, the jurisdiction will be in no manner abated or affected.

So we pass to notice the second suggestion, that the defendant, although a corporation of Arkansas, is not a citizen of Arkansas. This assertion seems to have been made in momentary forgetfulness of plain and repeated adjudications of this and other Federal courts. In R'y Co. v. Whitton, 13 Wall 270, this court responding to the same suggestion, said:

"In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin, by the laws of that State. It is not there a corporation or a citizen of any other State. Being there sued it can only be brought into court as a citizen of that State, whatever its status or citizenship elsewhere may be."

This language leaves no room for contending that a corporation of Arkansas is any less a citizen of Arkansas because the same persons have been, by the legislature of some other State, made a corporation of such other State by the same style. True it does not appear in the Whitton case that the Wisconsin corporation was created after the Illinois was, but in Memphis R'y v. Ala. supra, it did appear that Alabama had adopted a corporation already existing in Tennessee, and the court remarked that, "as to all its doings within the State of Alabama, it must be considered a citizen of Alabama, which cannot sue or be sued by

another citizen of Alabama in the courts of the United States." In the later case, of Martin v. R'y supra, this court declared plainly that the reason why such adopted corporation cannot remove into the Federal court a suit brought against it in the State of its adoption, by a citizen thereof, is "because it is a citizen of the same State with him." The very well considered case of Uphoff v. R'y Co. 5 Fed. 545, discusses with fullness and clearness (in the light of the decisions of this court then made, as well as in line with its later opinions) the citizenship of a corporation created by adoption and holds that "*its status is the same as if it had been originally and solely incorporated by the State adopting it*" and hence that the presumptive citizenship of the incorporators of the new company is in the adopting State on the second creation, as it is in the first State upon the first creation. In Stout v. R'y Co. supra, it was said that, "*although the two corporations may be composed of the same persons, yet they are in law, for the purpose of suing and being sued, separate and distinct.*" There the plaintiff insisted that he was sueing the Ia. corporation (which was the first) and he was allowed to show, if he could, that he had brought that corporation into court but the only proof being of a service uron the agent of the Neb. corporation, the court declined to take jurisdiction of the Ia. company. Our case is just the contrary. We sued the domestic cor-

poration and brought it into court regularly. The doctrine announced in the Uphoff case has been applied in Johnson v. Ry. 9 Fed. 6 (McKennon C. J. and Butler J.) ; Horne v. Ry. 13 id 50 (Lowell C. J.) ; Nashua Ry. v. Boston Ry. 19 id 804; Burger v. Ry. Co. 22 id 561 (Woods C. J.) and Union T. Co. v. Ry. 29 id 609 (Atcheson C. J.) These decisions, while not controlling authority here, must certainly, as the deliberate coinciding opinions of a number of the ablest members of the Fed. judiciary, be of great persuasive weight. There is no escape as it seems to us from the application here of the rule that a corporation is a citizen of the State creating it. It follows if these views be correct that the defendant was a citizen of Arkansas and that the court below was possessed of the jurisdiction which it exercised.

SECOND.

IS DEFENDANT RESPONSIBLE FOR THE ALLEGED WRONG?

Plaintiff rests her right to maintain this action against the defendant, upon the established rule that *suit may be brought against any one or more of joint wrong doers, at the election of the injured party.* "It is the general rule, and a marked distinction between torts and contracts, that the plaintiff may sue any or all of those who committed the tort. The rule is applied alike to all classes of torts and to all forms of action."

I. Hilliard on Torts 292.

This court in Dennick v. Ry. 103 U. S. II. classified statutory actions for death as "trespass to the person, always held to be transitory and the venue immaterial." That the negligence of a master toward his servant, raises a cause of action within this principle, follows so necessarily that it has been assumed without remark. In Ry. Co. v. Brown 17 Wall 445 where a road lying partly in Virginia and partly in the District of Columbia, was operated jointly as one line by the receiver appointed for the part in the District and by lessees of the part in Va. it was said that "*Both*" (i. e. the receiver and the lessees) "*were, therefore, alike responsible for the act complained of*." In Kain v. Smith 80 N. Y. 458 a more definite and complete statement is that, "The plaintiff's right of action is founded on a duty which every railroad operator owes to his employees, and which requires him to furnish machinery adequate and proper for the use to which it is to be applied, and to maintain it in like condition for their protection and safety. For every injury happening by reason of neglect to perform this duty, he is liable as for a tort, and this is so whether the act or omission causing it, was due to his personal neglect or the neglect of an agent employed by him, and *whether there are one or more parties concerned as operators or employers, can make no difference. The liability is several as well as joint.* (Creed v. Hartman 29 N. Y. 591; Robert v. Johnson 58 id. 613)".

So if the defendant was the employer of James and he came to his death in such service, by reason of the defendant's neglect of any duty which it owed him, this action can be maintained, notwithstanding

he may have been jointly employed by defendant and another railway corporation, and may have met his death on a line of road, which was the sole property of that joint employer.

This brings us naturally then to two inquiries;

1 Was James in the employ of defendant and

2 Was the death of James caused by the neglect of the defendant?

We answer both of these questions in the affirmative on the ground that, the record discloses that, *The St. Louis and San Francisco Ry. of Mo. and the defendant were at the death of James jointly operating the line on which he was killed.* Assuming as we do for the purpose of this argument that the record shows that the defendant is a domestic corporation of the State of Ark., it further appears that since May 6, 1889 the line of road between Monett and Ft. Smith of which the part in Ark. belonged to the defendant, "was operated as one line of railroad. *The stockholders and officers of the Missouri corporation and the Arkansas corporation were identical, and all the operating expenses of such line were paid from its earnings, which went into one treasury.*" Such a state of facts as this would undoubtedly constitute a joint operation of this road, a joint employment of James to assist in its operation, and consequent joint and several responsibility for the neglect which, caused his death, unless there be something in the origin and history of these corporations, which com-

pels a different conclusion. A plainer case of joint operation could not be stated. The same persons as officers of both corporations, directing and carrying on the operations of the whole line as a unit, the income derived from the whole line passing into one common treasury from which the expenses of operating the whole line were paid. Suppose, to illustrate, that A and B each own 10 miles of private turnpike which, connected together, make a continuous line of 20 miles between two points, that they appoint C to operate the whole as one line and D to receive the income therefrom and pay the expenses of the whole line from such income, and that James, having been employed by C to drive a coach over the line, had been injured by a defect in the road. Would there be any doubt that James could maintain an action against either A or B, or both, totally regardless of the fact that one of them was the sole owner of the line at the particular point where the injury occurred? That the record does not disclose the contract under which this joint operation took place, or even that there was a contract at all, is wholly unimportant. Whether there was a contract is a matter which concerns, very vitally perhaps, the relations of the two corporations to each other, but it does not concern, in the least, their employees. James was there because they had jointly, by the single act of one individual, employed him to fire

a locomotive the length of the whole line. Whether they divided the profits or losses at all and if so, how, are matters with which he had no concern. His duties were unaffected by those questions and their responsibility to him equally unaltered. He did not go from Ft. Smith to the State line as the employee of the Ark. corporation and from thence to Monett as that of the Mo. company. That would have required two contracts and double payment for his services. He no more did that than the shipper over the line made two separate contracts one for passage over the line in one State and another for transfer over the line in the other. When the Ark. corporation undertook to carry a passenger to Monett, Mo., its duties to him were the same on either side of the boundary between the two States, and when it employed a fireman to perform, in both States, service necessary to carry such passenger to his destination, its duty to him did not cease at the boundary line any more than its duty to the passenger did. It was a joint train of the two companies all the way from Monett to Ft. Smith, and each of them was therefore responsible for any wrongs committed in its operation. James was the joint employee of both during the whole run for he had been employed by both to do exactly the same thing, viz., to run on that train. On every mile of the line he was the servant of both and each of them owed him the duty to

see that the track over which he ran was in proper condition for the reasonably safe performance of the whole of his duty. In Ry. Co. v. Peyton 106 Ills. 534, the defendant had leased the right to run its trains, at a certain place, over the track of another company and, while operating its train on the leased track, struck a board which had been left too near the track and knocked it against the plaintiff. The defense was that the owner and lessor of the track was responsible for its condition, but the court held that if the lessor was responsible, that would not defeat the action against the lessee, saying, that "It was then the duty of the appellant, by its servants, to see and know that the track was in a good and safe condition, not only to the passengers, but to those rightfully near to and liable to be injured by its being operated in an unsafe condition," and that

"Appellant, by the contract, for the purpose of running into and out of the depot, made this portion of the track its own, and must be responsible for all injuries resulting from negligence in keeping or permitting it to be in an unsafe condition."

But, as we have already indicated, these views as to the status of an employee of joint operators of a railway, seem so self evident, that we feel justified in assuming that their application here will be resisted olely, on the ground that the defendant, having been created of the same persons who already composed the St. L. & S. F. Ry. of Mo., for the purpose of superseding the foreign corporation in the ownership of property

and the carrying on of business in Ark. stands so related to it, that the assumptions and presumptions which would apply to two ordinary railway corporations are not allowable here. This is tan tamount to denying that defendant is a perfect corporation of its kind, or asserting that it wants some of those essentials to corporate being, which are common attributes of all corporations of its class, and therefore, cannot be presumed to have engaged in the joint operation of a railroad and incurred the liabilities which would grow out of that undertaking.

We insist that the defendant is not only a domestic railway corporation of Ark. but that it is a *perfect* railway corporation, wanting no one of the powers and prerogatives which the legislature of the State has bestowed upon corporations of its class. As the Constitution of the State prohibits the creation of specific corporations, and of corporations with special powers, no inference will be indulged that the legislature has authorized the creation of a corporation, which is any less a corporation than any other of its class, unless such inference is imperatively required. The whole charter of the defendant is found in the declaration that it shall "become a corporation of this State." Into this language the word "railway" must be imported as the plain intent was to create a *railway* "corporation of this State." Now where are any limitations of

powers which this language requires or naturally implies? Arkansas either created the defendant a railway corporation under its Constitution and laws or it did not. When it is conceded that it did so, it must be presumed to have intended that such corporation should be possessed of all the powers conferred by law upon corporations of that class unless words of imperative limitation are used. There are found enumerated in Sec. 6151 et seq. of Sandels and Hills Dig. Stat. of Ark., the usual powers of railroad corporations. So it comes to the question what does "a railway corporation of Ark." mean? If it means a corporation with less than the powers bestowed upon railroads by the general legislation of the State, how much less? and who shall determine the powers or privileges omitted? The same intendment supports the claim to *all* of the *usual* powers, which supports the right to *any single one* of them. If any one of them can be justly denied to such a corporation, all of them can be withheld with equal reason and it will thus be left an empty name and nothing more. Such a conclusion is utterly illogical and unreasonable. The defendant was certainly created to operate a railroad, for that is the sole purpose for which such corporations are or can be organized. If it was intended to operate a railroad, why should it be denied any of the powers which the wisdom of the legislature has considered necessary in

all other instances to accomplish that purpose? If it was created a corporation, then like all other corporations, it could only act through such agents and employees as are necessary for its business. It could not operate a railroad without men to do so, and if it could employ a single man and occupy toward him the relations of a master to a servant, with the accompanying accountability to him, it could employ all needed servants and assume the same duties toward them. If it owned a railroad and was authorized to operate it at all, it was authorized to operate it in just such manner as its directors might deem for the best interest of its owners and patrons.

In Ry. Co. v. McCarthy 96 U. S. 258 this court upheld the right of a railway corporation to make a contract to convey passengers or freight to points beyond its line saying,

> "When a contract is not on its face necessarily beyond the scope of the powers of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their power."

The power to make such a contract includes of course the correlative power to make a contract of like character by which another corporation obtains like transport over its line, and the power to make a contract for receiving passengers and freight from a connecting line and delivering passengers and freight

to such connecting line, is ample warrant for any such contract between the two corporations, as shall, in their judgment, best subserve the conduct of such business and the interest of the public, who are to be accommodated. If such a result is to be best accomplished by an arrangement for operating part or all of the lines of each jointly, that is clearly within the power to make a contract on the subject at all. The policy of Arkansas on this subject, as shown by its legislation, is to encourage just such arrangements. The only railroads prohibited from leasing or being leased, are competing lines (Sec. 6302, Sandels & Hill, Dig.) and Secs. 6307 (3 subdiv.) 6310 and 6311 are plain recognitions (if any were needed) of the power of one road to operate another in or out of the State, by lease or otherwise. Such traffic arrangements have been in vogue so long and so commonly that the courts would be justified in taking judicial notice of their existence. In many instances (notably Nashua R'y v. R'y 136 U. S. 356) they have been before this and other courts, and we know of no instance where they have been condemned as ultra vires. The defense of ultra vires, however, if it existed, could not be interposed here, as this is an executed contract. And even if the arrangement between these parties was void, the defendant, standing, as to the Road, in Missouri, in the position of an occupant and operator, is liable in any event, as de-

cided directly in R'y Co. v. Timmon, 51 Ark. 459.

The defendant is either a railway corporation of the State of Arkansas, possessing the usual powers and privileges of railway corporations in the State, or it is nothing. The pressure should certainly be very great, that would compel a court to conclude that the legislature of a State intended to create a corporation without faculties, *a corporate imbecile*. But all uncertainty as to what powers the defendant actually has, disappears at once when it is remembered that, although the same association of persons may be concurrently or successively created corporations by several States, *such corporations exist in each State by virtue of the laws of that State alone*, and that *in each State the corporation of that State is as distinct from the corporation of the same name in any other State as if no such other corporation had ever existed.* The defendant corporation exists solely by virtue of the creating fiat of Arkansas, has the powers and is subject to the liabilities of an Arkansas railway corporation only, and is amenable solely to the power which created it. No act of the State of Missouri could affect in the slightest degree the property, rights and responsibilities of the defendant, so long as it confines its operations to the State which created it. As we saw supra in the Whitton case, the defendant is not in Arkansas "a corporation or citizen of any other State." In Clark v. Barnard, 108 U. S.

436, this court, considering the case of a railway corporation created by Rhode Island conferring upon a corporation of Connecticut the franchises which it (R. I.) had theretofore conferred upon a domestic corporation, said:

"If it had no previous existence as a corporation under the laws of Rhode Island it would have become such by virtue of the act in question. For although, as a Connecticut corporation, it may have had no capacity to act or exist in Rhode Island for these purposes, and no capacity by virtue of its Connecticut charter to accept and exercise any franchises not contemplated by it, yet the natural persons who were corporators might as well be a corporation in Rhode Island as in Connecticut, and, by accepting charters from both States, could well become a body corporate by the same name and acting through the same organization, officers and agencies in each, *with such faculties in the two jurisdictions as they might severally confer.* The same association of natural persons would thus be constituted into two distinct corporate entities, in the two States, acting in each according to the powers *locally bestowed* as distinctly as though they had nothing in common as to name, capital or membership. Such was in fact the case in regard to this company, so that in Rhode Island it was exclusively a corporation of that State, subject to its laws and competent to do within its territory whatever its legislation might authorize."

We have seen the same views expressed with force and convincing reasoning in Stout v. R'y; Uphoff v. R'y, and the other cases cited supra from the Federal Reporter. It must be true then that the question, what the powers of the defendant are, must be considered and determined exclusively in the light of the law and constitution of the State which created it, that its

"faculties" are those which Arkansas bestowed upon it, and that it acts in this State "according to the powers locally bestowed" as distinctly as though it "had nothing in common" with any other corporation "as to name, capital or membership." Turning to its charter from Arkansas it must be admitted that defendant was authorized to employ James for service, not only upon its train and line in Arkansas, but upon the train which, conjointly with another railway company, it was operating upon the line of that other company in Missouri.

The fear expressed, that if this suit is maintained, any citizen may sue the St. Louis & San Francisco R'y of Missouri in the Federal court of Arkansas, we do not share. This action will create a precedent as to actions arising out of the operation of the line between Ft. Smith and Monett, so long as it is jointly operated, and no longer. The defendant will remain responsible for its operations in Arkansas whether joint or several, and the corporation of the same name in Missouri will probably remain responsible alone for such of its operations in that State as are carried on by it without any connection with any other party. It is true that the legal consequences of creating the same persons corporations in several States, has been declared in various instances to extend much farther than we are going in this case. In Horne v. Ry. 18

Fed. 50 Lowell, C. J. held, "that the acts and neglects of the corporation" (alluding to the business unit which exists in all the States) "are done by it as a whole," and consequently that it could be sued in one State for an injury done by it in another, and that the judgment so obtained would be binding on it in all the other States where it existed. This ruling has been followed in several cases but has not been directly passed upon in this court. It is not necessary, and perhaps, under the certificate, would not be possible, for us to ask the application of that doctrine. As we conceive, the case presented by the certificate, can be decided favorably to the plaintiff below, without passing beyond the relations of these two corporations to the line of railway operated by them jointly

We ask affirmative answers to the questions propounded to the court.

FRANK W. HACKETT,
Attorney for Defendant in Error.

J. H. CLENDENING,
H. C. MECHEM,
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FILED.
SEP 20 1895
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY,
PLAINTIFF IN ERROR,
v.
ETTA JAMES.

No. 242.

On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

Reply Brief for Plaintiff in Error.

A. T. BRITTON,
E. D. KENNA,
A. B. BROWNE,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
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REPLY BRIEF FOR PLAINTIFF IN ERROR.

The argument for defendant in error defeats itself. At page 27, counsel declare:

"The defendant corporation exists solely by virtue of "the creating fiat of Arkansas, has the power and is sub- "ject to the liabilities of an Arkansas railway company, "only, and is amenable solely to the power which created it. "No act of the State of Missouri could affect in the slight- "est degree the property, rights, and responsibilities of the

" defendant, *so long as it confines its operations to the State* " *which created it.*"

Conceding all this, it is manifest that the Arkansas corporation does not and cannot operate a railroad outside that State. The railroad company in Missouri, if (as thus contended) a separate corporate entity, is manifestly operating *its* road in Missouri alone. There the Arkansas corporation has no recognized existence, and neither owns nor operates any railroad therein. The injury alleged as the cause of action having occurred in Missouri, upon the line of railroad owned and operated by the Missouri corporation alone, and the plaintiff being a citizen of Missouri, the Court below (Q. 3, R. 8) distinctly asks the ruling of this Court whether such cause of action can be maintained against the Arkansas corporation in the U. S. Circuit Court for that State.

The only ground urged by counsel in support of such jurisdiction is the assumption that the Arkansas corporation operates the *entire* line both in Arkansas and Missouri jointly with the Missouri corporation, and is hence a joint tort feasor against whom separate suit may be brought.

Non constat. The Arkansas corporation operates *no* road in Missouri, and by the admission of counsel and the settled precedents has no power or right to do so. It is neither joint owner therein with the Missouri corporation, nor does it operate such line therein as lessee. Its existence, its powers, its ownership, and its liability stop at the boundary line of Arkansas. Otherwise, the Statute of Arkansas, compelling involuntary incorporation therein, exercises a power and creates liability against the Arkansas corporation wholly beyond the power or intention of that State to so create. No case can be found in the books

which sustains the singular contention urged *contra*, viz: (1) that this plaintiff in error, as a corporation of Arkansas, cannot be affected by the laws of Missouri in any way, "so long as it confines its operation to the State which "created it," and (2) may yet, by reason of its Arkansas incorporation, be held as operating jointly or otherwise the line in Missouri, and subject to suit for a cause of action arising in *that* State. There cannot be separate identity of corporations existing only in the States creating each, and unity of liability for injuries committed by each. There is not one road operated by two corporations. The Arkansas corporation owns, operates, and controls the road operated in that State; the Missouri corporation owns, operates, and controls the road operated in that State.

That is the main burden of counsel's argument. The logical result therefrom is that for torts committed or injuries inflicted in each State the corporation owning and operating the road therein is alone liable.

The assumption that James, when killed in Missouri, was *there* the employé of the Arkansas corporation is equally unsound. The Arkansas company was not operating a railroad in Missouri. Assuming *pro argumento* the joint employment of James by both the Arkansas and Missouri corporations, it is obvious that the injury occurred while James was acting for and performing duty for the Missouri corporation alone. A person may be so employed by two or more, and it is obvious that an injury received while in the service of one employer would not create liability against the other.

A. T. BRITTON,
E. D. KENNA,
A. B. BROWNE,
Atty's for Plaintiff in Error.

161 U.S. 573

TRANSCRIPT OF RECORD.

161-573

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 89.

CHARLES H. GILDERSLEEVE, APPELLANT,

vs.

THE NEW MEXICO MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED FEBRUARY 20, 1892.

(14,979.)

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Bill of complaint	1	1
Copy of patent referred to in bill of complaint	24	15
Answer of New Mexico Mining Co. *et al.*	38	23
Answer of Elias Brevoort	60	37
Stipulation as to cross-bill of Brevoort	66	41
Order granting leave to file cross-bill of Brevoort	67	41
Cross-bill of Elias Brevoort	67	41
Appearance for New Mexico Mining Co. *et al.*	92	55
Separate demurrer and answer of New Mexico Mining Co. to cross-bill	93	56
Affidavit of denial by Elias Brevoort	119	71

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 28, 1895.

	Original.	Print.
Stipulation as to intervention of C. H. Gildersleeve	121	73
Order granting leave to C. H. Gildersleeve to intervene, &c.	122	73
Intervening petition of C. H. Gildersleeve	122	74
Exhibit—Deed, Brevoort to Knaebel and Gildersleeve, June 30, 1880	129	77
Petition of C. H. Gildersleeve for leave to become party to cross-bill, &c.	134	80
Exhibit 1—Deed, Brevoort to Knaebel and Gildersleeve, June 30, 1880	139	83
2—Affidavit of John Gray	144	86
3—Affidavit of Marcelino Garcia	145	87
4—Affidavit of R. W. Webb	146	87
Certificate of clerk and recorder	146	88
Motion to vacate order allowing Gildersleeve to intervene	147	88
Affidavit of Alfred J. Wolf	147	89
Order taking motion under advisement	149	90
Order granting petition of Gildersleeve for leave to become party complainant in cross-bill, &c.	149	90
Answer of C. H. Gildersleeve to bill of complaint	152	92
Amended cross-bill of C. H. Gildersleeve	159	96
Separate demurrer and answer of New Mexico Mining Co. to amended cross-bill	187	112
Separate plea of New Mexico Mining Co. to amended cross-bill	215	128
Replication to answer	219	130
Replication to pleas	221	132
Motion to strike out pleas	222	133
Order overruling motion to strike out pleas	223	133
Order overruling pleas of former adjudication, &c.	223	133
Order appointing master, &c.	225	135
Decree of October 6, 1887	226	135
Ortiz mine decision	227	136
Depositions in case of New Mexico Mining Co. *vs.* United States.	230	137
Testimony of Joab Houghton	230	137
Francisco Baca y Ortiz	232	138
Samuel Ellison	232	139
Copy of tabular statement of Whittelsey *et al.*	233	139
Brief of claimants in case of New Mexico Mining Co. *vs.* United States	234	140
Deed, John Greiner *et ux.* to Elisha Whittelsey *et al.*	236	141
Petition in case of New Mexico Mining Co. *vs.* United States	243	145
Translations of original Spanish documents	246	147
Objections of Gildersleeve to master's draft report	255	152
Objections of New Mexico Mining Co. *et al.* to master's draft report	259	155
Exceptions of New Mexico Mining Co. *et al.* to master's report.	262	156
Exceptions of Gildersleeve to master's report	265	158
Final decree	269	160
Assignment of errors	272	162
Order taking cause under advisement	273	163
Final decree	274	163
Motion for rehearing	274	164
Order postponing motions	276	165

	Original.	Print.
Order denying motion for rehearing	276	165
Petition for allowance of appeal	276	166
Affidavit of value	277	166
Order allowing appeal, &c.	277	167
Statement of facts	278	167
Bond on appeal	310	184
Opinion	311	185
Clerk's certificate	320	192
Citation	321	193
Proof of service of citation	322	193
Assignment of errors	323	194

a Supreme Court, Territory of New Mexico.

CHARLES H. GILDERSLEEVE, Plaintiff in Error,
vs.
NEW MEXICO MINING COMPANY *et al.*, Defendants in Error.

Be it remembered that heretofore, to wit, on the 16th day of December, A. D. 1889, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico the following transcript of the record of the district court of the first judicial district of said Territory within and for the county of Santa Fé in the above-entitled cause; which said transcript, or so much thereof as the said Charles H. Gildersleeve deems necessary for the proper review of said cause in the Supreme Court of the United States, was and is in the words and figures following, to wit:

1 TERRITORY OF NEW MEXICO,
First Judicial District, County of Santa Fé.

Be it remembered that heretofore, to wit: on the twenty-ninth day of January, in the year eighteen hundred and eighty-three, Edward T. Farish and others, by their solicitors, filed in the office of the clerk of the district court of the first judicial district of the Territory of New Mexico, sitting within and for the county of Santa Fé, their bill of complaint against the New Mexico Company and others, which said bill is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Santa Fé, } *ss:*

In the District Court for the First Judicial District of the Territory of New Mexico, Sitting in the County of Santa Fé, in the said Territory, February Term, A. D. 1883.

To the Honorable S. B. Axtell, chief justice of the supreme court of the Territory of New Mexico, judge of the first judicial district court thereof:

Your orators, Edward T. Farish, a citizen of Missouri, residing in the city of St. Louis, in said State, Benjamin M. Read, Modesto Ortiz, Teodora Ortiz de Martinez and Transito Martinez husband of the Teodora de Martinez, citizens of the United States, residing in the said Territory of New Mexico, bring this their bill, against the New Mexico Mining Company, a corporation duly organized under the laws of said Territory, and Stephen B. Elkins, Jerome B.
2 Chaffee and R. W. Donnell, each a citizen and resident of the State of New York, Lars Anderson, a citizen and resident of the State of Ohio; Elias Brevoort, a resident of the county of Santa Fé, in said Territory of New Mexico; also against Nestor Sandoval and Marcos Ramirez, citizens of Colorado, residing in Las Animas county, in the said State; and Luis Ortiz and Juan Ortiz,

residents of said Territory of New Mexico, and against other persons not known to your orators, who, when discovered, your orators pray may be made parties defendant to this bill.

Whereupon your orators complain and show unto your honor, that one Josie Francisco Ortiz and Ignacio Cano deceased, in their lifetimes, to wit: in the year eighteen hundred and thirty-three, then being citizens of the Republic of Mexico, in pursuance of the mining ordinances of the Kingdom of Spain, which were at that time in full force and effect within all parts of the Republic of Mexico, registered in the office of one Francisco Baca y Ortiz, then being the constitutional alcalde of Santa Fé, in the department of New Mexico, a mineral vein of gold-bearing rock which was discovered by them in the Oso mountain, within the present county of Santa Fé, in the Territory of New Mexico, being situated in the rear of the mine, then known as the "Compromise mine," and called by the said Jose Francisco Ortiz and Ignacio Cano, "Santa Rosalia," and prayed by the peti-on to the constitutional alcalde, that the said mine, so discovered, be granted unto them, the said Jose Francisco Ortiz and Ignacio Cano, and in pursuance of said petition and other usual things done by them, the said Jose Francisco Ortiz and Ignacio Cano, requisite to the legal acquisition of the said mine of "Santa Rosalia," the said constitutional alcalde, conformably to the authority in him vested by law, admitted the application of the said Jose Francisco Ortiz
3 and Ignacio Cano, and requisite proof having been made by them of the discovery of the said mine and the improvement and the working of the same by the construction of a shaft of the width and depth required by the ordinances aforesaid, the constitutional alcalde, in virtue of the said ordinance, in the name of the Mexican Republic, on the eighteenth day of December, in the year eighteen hundred and thirty-three, put the said Jose Francisco Ortiz and Ignacio Cano, into the legal and exclusive possession of the said mine of "Santa Rosalia," so called, measuring out to them by metes and bounds on the north from the orifice of said mine, eighty varas, sufficient to form a boundary fronting the south from the mine of Santo Nino, which Dolores Jalomo and Company were at that time working, and in southern direction five hundred and twenty varas, and measuring from east to west under the said vein fifteen varas; and that the said juridical possession of the mine, having been so given to them, the said Jose Francisco Ortiz and Ignacio Cano, represented to the said constitutional alcalde, that, by the provision of the law, they were authorized to be invested with the privilege of the necessary water supplies and issues for the working of machinery and of pasturage of cattle to be used in connection with the working of the said mine of "Santa Rosalia;" and in pursuance of the law of the Republic of Mexico, the said Jose Francisco Ortiz and Ignacio Cano formally petitioned the said constitutional alcalde for the privileges of the necessary water *and* supplies and issues for the working of the machinery and of pasturage of cattle, and the grant of land adjacent to the said mine for the said purposes, whereupon the said

constitutional alcalde, considering the said petition and the justice of the same, in pursuance of the provisions of the law, granted in the name of the Mexican Republic unto the said Jose Francisco Ortiz and Ignacio Cano and unto their heirs forever, the land
4 adjacent to the said mine of "Santa Rosalia," being then a portion of the public domain of the Republic of Mexico, of the dimensions and area of four leagues square, to wit: two leagues from said "Santa Rosalia" mine, to all the cardinal points of the compass, to wit: two leagues to the north, two leagues to the south, two leagues to the east and two leagues to the west, from the orifice of said mine, and all the land situated and compromised within the land contained therein, for the purposes aforesaid.

By all which acts and things done by the said Jose Francisco Ortiz and Ignacio Cano and the said constitutional alcalde, Don Francisco Baca y Ortiz, the ownership and title of the said mine of "Santa Rosalia," together with the said estate, right, title and interest in and to the tract of land adjacent thereto, and hereinbefore described, became vested in the said Jose Francisco Ortiz and Ignacio Cano, and their heirs and assigns forever, for the uses and purposes aforesaid; and they, the said Jose Francisco Ortiz and Ignacio Cano and their heirs and assigns became entitled, under the laws of the Republic of Mexico, existing and in force at the time of the said grant and of the treaty thereafter made and ratified between said Republic of Mexico and the United States of America, known as the treaty of Guadalupe Hidalgo, became entitled to a confirmation of their said grant, and to a release and quitclaim from the United States to said mine, called "Santa Rosalia," and to all the lands connected with said mine, included in the boundaries aforesaid.

And your orators further show that said Jose Francisco Ortiz and said Ignacio Cano, by reason of the grant aforesaid, became and were tenants in common of the said mine and adjacent lands, and each was owner of an undivided one-half thereof; that they entered into the possession of the said mine and lands, as such ten-
5 ants in common, and occupied and enjoyed the same together until the death of said Ignacio Cano, which occurred about the year 1836, but your orators are unable to state the precise date. And after the death of said Ignacio Cano, said Jose Francisco Ortiz continued to hold possession of said mine and lands connected therewith for the use of himself and the heirs-at-law of said Ignacio Cano, until the death of said Jose Francisco Ortiz, which occurred some time in the year 1848.

And your orators further show that said Ignacio Cano died intestate and leaving five children, his heirs-at-law, namely, Maria Antonia Cano, Teresa Cano, Ignacio Cano and Jose Maria Cano. Said Maria Antonia Cano was twice married; she had one son by her first husband whose name was —— Sandoval; by her second husband, whose name was Ramirez, she had one son. Both sons are still living and residents of Las Animas county, Colorado; said two sons are made respondents to this bill and are named Nestor Sandoval and Marcus Ramirez respectively. Said Nestor Sandoval is

over the age of twenty-one years, and said Marcus Ramirez is a minor; said Maria Cano is dead.

Said Teresa Cano intermarried with Antonio Sandoval about the year 1847, and she and her said husband are still living, but before the filing of this bill they conveyed to your orator, Edward T. Farish, all their right, title and interest in and to the said grant and the lands embraced therein, by a deed duly executed September 6th, A. D. 1882, which deed your orators pray leave to produce at the hearing of this cause.

Said Ignacia Cano was twice married; by her first husband, whose name was —— Read, she had only three children, viz: Benjamin M., Larkin G. and Alexander, who are complainants herein. After the death of her first husband, said Ignacia married Matteo Ortiz, who is still living, but said Ignacia is dead. By her last-named husband said Ignacia had four children and
6 no more, viz: Modesto C. Ortiz and Theodora Ortiz, who are made complainants herein, and Luis Ortiz and Juan Ortiz who are minors and are made defendants.

Said Ignacio Cano, the younger, was never married. He disappeared from the Territory of New Mexico about the year 1860, since which time he has never been heard from, and your orators believe he is dead.

Said Jose Maria Cano, the last of the five children of said Ignacio Cano, above named, by deed duly executed, conveyed to the complainant, Edward T. Farish, on July 3d, 1882, all his right, title and interest in and to the said grant and lands conveyed thereby. Orators pray leave to produce said deed on the hearing of this cause.

As to the said Jose Francisco Ortiz, it is claimed by defendant, Elias Brevoort, that he died intestate, and that he, Brevoort, acquired by proper conveyances from the heirs-at-law of said Ortiz, all the right, title and interest of said heirs in and to the said grant and the lands conveyed thereby. But your orators say that they do not know and cannot state whether said Ortiz died intestate or not, and that defendant-, The New Mexico Mining Company, Stephen B. Elkins, R. W. Donnell, Jerome B. Chaffe and Lars Anderson claim that the said Ortiz died testate, and by his last will devised and gave to his widow all his right title and interest in and to said grant and the lands thereby conveyed, and said defendants claim title to the same by virtue of conveyances duly executed from said widow and her grantees. Whether the claims and pretentions of the said Brevoort are true, or whether the other defendants last named have succeeded to the right, title and interest of the said Ortiz in said grant and premises, orators do not know and therefore cannot state; but they do aver and charge that the entire interest of all of said defendants, both those claiming under the widow of said Ortiz and those claiming under his heirs-at-law, is limited to an undivided one-half of said grant and premises, and that
7 they are entitled to hold and enjoy said one-half and no more.

And your orators further show that pursuant to and in conformity

with a certain act of Congress of the United States of America, approved on the 22d day of July, in the year eighteen hundred and fifty-four, entitled "An act to establish the office of surveyor general of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes." The United States surveyor general in and for the Territory of New Mexico, investigated the matter of the aforesaid grant, of the said mine, lands and premises, and examined, considered and determined upon the fact and validity of the said grant, and thereupon, to wit: on the twenty-fourth day of November, in the year eighteen hundred and sixty, (1860), he duly made his report, pursuant to the said act, which report bears date on the said day last mentioned, and therein and thereby he decided and determined the said grant to be authentic and valid, and recommended the same to Congress aforesaid, for confirmation, pursuant to the said treaty of Guadalupe Hidalgo.

And your orators further show that after the making of the said report by the said surveyor general, Congress aforesaid, pursuant to the treaty of Guadalupe Hidalgo, and out of the tender regard for the obligations thereof and for the benefit and advantages of the heirs and assigns of the said original grantees of the said mine of "Santa Rosalia" and of the said tract of land, and with the intent and for the purpose not only to confirm to them the said grant, but also to enlarge their estate and interest thereunder, by granting to and vesting in them, the said heirs and assigns, the fee-simple absolute in the said tract of land, passed a certain other act, approved on the first of March, eighteen hundred and sixty-one, (1861), entitled: "An act to confirm a certain private land
8 claim in the Territory of New Mexico," wherein and whereby the grant aforesaid, and the said report thereon, were recited and the said grant was referred to as private land claim number forty-three, (43), and wherein and whereby it was expressly declared that the said confirmation should only be construed as quitclaim or relinquishment on the part of the United States and should not affect the adverse rights of any other person or persons whomsoever.

And your orators further show that they are advised and believe that the said act of confirmation operated according to the said intent and purposes thereof, not only as a recognition and confirmation of the said original Mexican grant, but also as a new and enlarged grant in favor of the said heirs and assigns of the said original grantees, and as to confer upon and vest in the said heirs and assigns, full and absolute title in fee-simple of, in and to the said tract of land, after the final settlement of the boundaries thereof.

And your orators further show that pursuant to the statute in such case made and provided, and to the course and practice of the General Land Office of the United States aforesaid, the said United States surveyor general, in and for the said Territory of New Mexico, caused the said tract of land to be surveyed and laid out by metes, bounds and landmarks, and a plat or map thereof to be made, and thereupon duly made a return of the said survey and the field-

notes and data thereof, and of the said map or plat to the Commissioner of the said General Land Office, and thereafter, to wit: in the year eighteen hundred and seventy-five, the said Commissioner duly approved the said survey, except as to part hereinafter mentioned.

And your orators further show that according to the said return, field-notes, survey and map or plat, a copy of which map or plat is herewith filed as part of this bill of complaint, the said tract of land, which is all situated in the county of Santa Fé, in the said Territory of New Mexico, is particularly bounded and described as follows, that is to say:

Beginning at the center point of the grant (which is in the mountain basin surrounded on all sides by the mountains, latitude 35 deg. 20 min. north, variation 13 deg. 2 min. east, the village of Placer, bearing north 66½ deg. east, distance 7,600 chains from center point) run east 61 chains, at 43 chains an arroyo, course N. E. at 60 chains met high mountain, course nearly east offset north 4 chains 75 links east, four miles, 35 chains, 66⅔ links, south four chains and 75 links, to a point due east of center point of grant. This base line from center of grant to a point due east is 5 miles, 16 chains and 16⅔ links, being 2 Spanish leagues at this point, due east from center, set stone 10 x 8 x 3 inches marked C. P. and E. B. from center point on east boundary of grant; around this stone is a large mound of stone. The whole of this line is down east slope of mountain, gradual declination. This center point on this boundary is 2 chains north of bluff of mesa. From center point on east boundary, or point of beginning, run south along the east boundary of grant, 2 chains to cliff of mesa, 10 chains in valley, one mile set a stone, 15 x 2 x 3 inches, marked I. E. B., for one-mile point on east boundary from center point. This stone is in a mound of stone. At one mile and 50 chains, land level, at 2 miles set a stone marked 2 E. B., for 2-mile point on east boundary from center point; at 2 miles, 16 chains and 23 links, intersected third correction line, north 13 chains and 77 links, west of corner to section 35 and 36, township 13 north, range 8 east; at 3 miles set a stone 9 x 7 x 2 inches, marked 3 E. B., for 3-miles point on east boundary; at 3 miles and 30 chains, begin to ascend mesa, at 3 miles and 48 chains on mesa, at 3 miles and 49 chains descend from mesa, at 3 miles and 54 chains, ascend another mesa, at 4 miles set a stone, 12 x 6 x 4 inches in mound of stone, marked 4 E. B., for 4-miles point on east boundary from center point.

At 4 miles and 40 chains, level prairie; at 5 miles set a stone, 16 x 9 x 6 inches in a mound of earth, for 5-miles point a stone marked 5 E. B.; at 5 miles 16 chains and 66⅔ links set a stone 12 x 7 x 4 inches in mound of earth for southeast corner of grant, stone marked S. E. C.; latitude of this corner 35 deg. 16 min. N. variation, 12 deg. 27 min. E. From S. E. corner of grant run west along the south boundary of grant, at one mile set stone 12 x 8 x 2 inches in mound of earth, stone marked 1 S. B., for 1 mile on south boundary from S. E. corner of grant. At one mile and 42 chains, old road leading to mines, course N. W. and S. E.; at 1 mile and

77 chains and 50 links, road bears south; at 2 miles set a stone 12 x 4 x 3 inches in a mound of earth, marked 2 S. B., for 2 miles on south boundary from S. E. corner; at 3 miles set stone 12 x 6 x 6 inches in a mound of earth, marked 3 S. B., for 3-miles point on south boundary from S. E. corner of grant: at 4 miles set stone, 11 x 11 x 6 inches in a mound of stones marked 4 S. B., for 4-miles point on south boundary; at 4 miles and 30 chains begin to ascend mountain, course of mountain nearly N. and S.; at 5 miles set stone 15 x 9 x 5 inches in mound of stone marked 5 S. B., for 5-miles point; this point on top of mountain is an arroyo; at 5 miles, 15 chains and 50 links, triangulate from mountain top to mountain top, base 1 chain, angle 27 min., distance 127 chains and 33 links; triangulate base 1 chain, angle 1 deg. 13 min., distance 47 chains and 8 links; at 7 miles, 29 chains and 90 links, set stone 24 x 12 x 6 inches on a large rock on mountain, for point on south boundary, marked S. B. for south boundary.

At 7 miles and 40 chains many pits of miners, miners now at work north of line, a stone black indicating coal. At 7 miles,
11 44 chains and 15 links offset north, 14 chains and 50 links to avoid high mountains, which extends out west, thence west for the last 3 miles, very high mountain south of line over some of which the line passes; at 8 miles and ten chains, traces of mines, very rocky; at 8 miles and 60 chains, a number of houses to north of line on an arroyo 55 chains north of line. At 9 miles and 50 chains, on side of high mountain ridge, (S. side), at 9 miles and 75 chains, in bottom on west side of mountain; at 10 miles, 33 chains and 33⅓ links offset south, 14 chains and 50 links to south boundary of grant where set stone 12 x 6 x 6 inches in a mound of stone, marked S. W. C., for southwest corner of grant, latitude, 35 deg. 16 min., variation 13 min., 10 miles, 33 chains and 33⅓ links, (4 Spanish leagues). From the southwest corner of grant, run north along the west boundary of grant, at 55 chains, land broken; at 1 mile set stone 10 x 7 x 7 inches in a mound of earth, marked 1 W. B. for 1 mile on west boundary from S. W. corner; at one mile and 45 chains, road from mines to Algodone's, at 1 mile and 55 chains, high bluff, north of which runs a creek E. and W.; at 1 mile and 55 chains, road runs E. and W.; at one mile and 58 chains, road runs east and west; at 2 miles raise a mound of earth for 2-miles point on west boundary; at 2 miles and 40 chains, level prairie; at 3 miles raised a mound of earth for 3-miles point on west boundary; at 3 miles and 68 links, intersected third correction line north, 7 chains and 70 links west of quarter-section corner in section 31, township 13 north, range 7 east. At 4 miles raised a mound of earth for 4-miles point on west boundary. At 4 miles, 42 chains and 50 links, cross a road leading to mines from west; at 5 miles raised a mound of earth for 5-miles point on west boundary from S. W. corner of grant, in which placed a stone 14 x 6 x 2 inches, marked 5 W. B.; at 5 miles and 10 chains, land becomes high; at 5 miles and 30 chains level plain on top; at six miles set stone 12 x 9 x 6 inches
12 in a mound of stone, marked 6 W. B., for six-miles point on

western boundary; at 7 miles set stone, marked 7 W. B., in mound of small stones for 7-miles point; at 8 miles set stone, 12 x 9 x 3 inches in mound of stone, marked 8 W. B., for 8-mile point on W. boundary. At 8 miles and 40 chains, land broken; at 9 miles set stone 14 x 10 x 4 inches, marked 9 W. B., for 9-miles point; at 10 miles set stone, 17 x 10 x 7 inches in a mound of stones, marked 10 W. B., for 10 miles on west boundary; at 10 miles, 33 chains and *and* 33⅓ links, set stone 11 x 10 x 8 inches, in a mound of stone, marked N. W. C., for northeast corner of grant, latitude 35 deg. 25 min. north, variation 13 deg. 1 min. east; this corner stands on the east side of a sandy ridge. From the northwest corner of the grant run east along the north boundary of the grant at 20 chains an arroyo flows from east to west, at 40 chains very rocky and broken; at 1 mile set stone 27 x 12 x 7 inches, marked 1 N. B., for 1-mile point on north boundary from N. W. corner of grant; at 1 mile and 30 chains, a solid bed of *of* rock; at 1 mile and 55 chains, top of rock mesa; at 2 miles set stone 15 x 9 x 5 inches in a mound of stone, marked 2 N. B., for 2-miles point on north boundary from N. W. corner of grant; this line for the last 2 miles over high mesa, sharp ridges and deep gulches running northward from mountains; at 3 miles set stone 14 x 10 x 2 inches in a mound of stone for 3-miles point on north boundary, a stone marked 3 N. B.; at 4 miles set stone 24 x 14 x 3 inches in mound of stones, marked 4 N. B., for 4-miles point on north boundary from the N. W. corner; at 5 miles set stone 13 x 9 x 5 inches in mound of stones, marked 5 N. B., for 5-miles point on north boundary; at 6 miles set stone 13 x 13 x 3 inches in mound of stones, marked 6 N. B., for 6-miles point on north boundary; at 7 miles set stone 17 x 15 x 10 inches in mound of stone, marked 7 N. B., for 7-miles point on north boundary;
13 at 7 miles and 40 chains, descend from mesa to bottom; at 7 miles and 55 chains, an arroyo course N. E.; at 8 miles set stone 11 x 7 x 7 inches in mound of stones, marked 8 N. B., for 8-miles point on north boundary; at 8 miles and 42 chains an arroyo course N. & S.; at 9 miles set stone 9 x 9 x 3 inches in a mound of stone, marked 9 N. B., for 9-miles point on north boundary; this corner stands on south bank of Galisteo creek, a course N. W., 2 chains 25 links wide from bank to bank, 12 chains to the middle of Galisteo creek; this line runs in the creek; at 9 miles and 40 chains, ascend mesa from bottom; at 10 miles set stone 24 x 18 x 17 inches in mound of stones, marked X. N. B., for 10 miles on north boundary; this point stands on the west side of mesa; at 10 miles, 3 chains and 33 links, top of mesa; at 10 miles and 9 chains, bottom between mesas; at 10 miles 21 chains, on side of mesa; at 10 miles 29 chains and 75 links, an arroyo, course S. W.; at 10 miles, 33 chains and 33½ links, N. E. corner of grant; at this point set stone 14 x 10 x 4 inches, marked N. E. C., for northeast corner of grant, being 4 Spanish leagues from east to west.

Beginning at the center point on east boundary of grant, run north along east boundary of grant, latitude 35 deg. 21 min., variation 12 deg. 59 min., east, at 40 chains follow down the side of a mesa; at 1 mile set stone 19 x 14 x 5 inches in mound of stone,

marked 1 E. B., for 1 mile on east boundary from center point; at 1 mile and 40 chains, down north side of ridge, at 2 miles set stone 11 x 6 x 7 inches in mound of stone, marked 2 E. B., for 2 miles on east boundary, from center point; at 2 miles and 45 chains, land begins to descend towards creek; at 3 miles set stone 14 x 11 x 7 inches in a mound of stone, marked 3 E. B., for 3-miles point on east boundary from center point; at 3 miles and 5 chains, crossed road from Galisteo to the Placer mines, course S. W., an arroyo just south of road, course N. E. at 3 miles and 65 chains, an arroyo, course N. E. at 4 miles set stone 24 x 14 x 7 inches in mound of stones, marked 4 E. B., for 4-mile point from center point on east boundary; here is a large pile of huge stones on line; from the 4-mile point, run a random line north at 4 miles and 40 chains and 50 links, Galisteo creek, course S. W.; at 4 miles, 43 chains and 50 links, Galisteo creek, course S. W.; at 4 miles, 43 chains, a rock 50 feet high; at 4 miles and 45 chains top of rocky mesa; at 5 miles set stone 12 x 7 x 5 inches in a mound of stone, marked 5 E. B., for 5-mile point on eastern boundary from center point; at 5 miles 17 chains and 2 links, intersected north boundary, 55 links west of N. E. corner of grant, correct back on line; at 17 chains and 2 links, more stone and mound of stones 45½ links east; at 5-miles point, the true bearing from 4-miles point on east boundary to N. E. corner of grant, is N. 89 deg. 58 min. E., distance 97 deg. — chains; at 5 miles and 17 chains, closed survey on the N. E. corner of grant; whole distance from center point on east boundary to N. E. corner of the grant, on August 14th, 1861, latitude 35 deg. 25 min. N., variation 13 deg. 1 min. east, containing sixty-nine thousand four hundred and fifty-eight $\frac{33}{100}$ acres (69,433.33 acres).

And your orators further show that after the passage of the said act of confirmation and after the making and approval of the said survey, and after examination by the Secretary of the Interior of the United States aforesaid, of a certain conflict hereinafter described, existing between the said survey and that of a certain other grant known as the Cañon del Agua grant, the said defendant, The New Mexico Mining Company, at and prior to the date of the letters patent hereinafter mentioned, wrongfully, falsely and fraudulently declared and represented to the United States aforesaid, and to the Commissioner of the General Land Office, and to the Secretary of the Interior of the United States aforesaid, and to Ulysses S. Grant, then the President of the United States aforesaid, that the said defendant, The Mexico Mining Company, had duly acquired by purchase from the legal representatives and assignees of the said Jose Francisco Ortiz and of the said Ignacio Cano all and singular the estate, right, title and interest and claim of which the said Jose Francisco Ortiz and the said Ignacio Cano died seized and possessed as aforesaid of, in and to the said mine of "Santa Rosalia," and the said tract of land and that therefore, as the legal assign of the said original grantees, the said defendant, The New Mexico Mining Company, came within the scope and intent of the said act of confirmation and of the enlarged grant

therein contained, and was entitled to be recognized by the United States aforesaid, and all the lawful authorities thereof, as the sole and only assign of the said original grantees, and as the sole, lawful claimant for the said grant of land, and as entitled to letters patent therefor from the United States, aforesaid, and thereupon the said false and fraudulent declarations, representations and suggestions of the said defendant, The New Mexico Mining Company, applied to the Commissioner of the said Land Office and the President of the United States as aforesaid, for letters patent to be issued to the said defendant, The New Mexico Mining Company, in its name for all and singular the said tract of land.

And your orators further show that notwithstanding the said grant, survey and act of confirmation, the United States aforesaid, by its lawful authorities, had, at that time of such application, already issued to one Jose Seratin Ramirez letters patent for a large tract of land known as the Cañon del Agua grant, which, as described in the letters patent last mentioned, embraced a certain piece or parcel, to wit: two hundred and fifty-nine acres, or thereabouts, of the same tract of land which had been surveyed as aforesaid,
16 as the tract granted as aforesaid to the said Jose Francisco Ortiz and Ignacio Cano, which piece or parcel of 259 acres or thereabouts can be easily ascertained and definitely separated by inspection and comparison of the respective surveys and descriptions of the said two several grants, and that such proceedings were had in the said General Land Office before the said Commissioners thereof, and afterwards by appeal before the said Secretary of the Interior; to all of which proceedings the said defendant, The New Mexico Mining Company was a party; that upon the said examination of the said conflict of surveys, the said Secretary decided and determined that the said piece or parcel of land, to wit: the said 259 acres or thereabouts, should be deducted from the said first-mentioned surveys and allowed to the owners of the said Cañon del Agua grant. And your orators further show that all and singular the aforesaid declarations, representations and suggestions of the said defendant, The New Mexico Mining Company, were untrue, false and fraudulent, and were then and there known to the said defendant, The New Mexico Mining Company, so to be, and yet that induced and misled thereby and believing the same to be true and with the same intent to issue letters patent for the said first-described tract of land, except the piece or parcel aforesaid of about 259 acres, to the legal representatives or assigns of the said original grantees, the said Ulysses S. Grant, acting as President of the United States, issued and delivered in the name of the United States aforesaid to the said defendant, The New Mexico Mining Company, certain letters patent under the seal of the General Land Office aforesaid, and under his official hand and bearing date the 20th of May, 1876, and of the Independence of the United States the one hundredth, and countersigned by the recorder of the said General Land Office, wherein and whereby the said Mexican
17 grant to the said Jose Francisco Ortiz and Ignacio Cano, and the said examination, report and survey of the said surveyor

general respecting the same, and the said act confirming the same, and the said conflict of descriptions respecting the said piece or parcel of about 259 acres were each and all recited among other things, and wherein and whereby the said United States of America gave and granted unto the said defendant, The New Mexico Mining Company, and its successors and assigns, all and singular the tract of land containing sixty-nine thousand, four hundred and fifty-eight $\frac{33}{100}$ acres (69,458.33) acres, hereinbefore particularly described, but excepting and reserving from the transfer by such letters patent so much of the land embraced in the said hereinbefore described tract, as is included within the survey of the said Cañon del Agua grant, approved by the surveyor general of the Territory of New Mexico, on the 16th day of October, 1886, and patented to Jose Serafin Ramirez and his heirs and assigns, on the first day of July, 1875, and estimated to contain about 259 acres, as aforesaid, and with the further express stipulation, that in virtue of the provisions of the aforesaid act of Congress, approved the 1st of March, 1861, the confirmation of the said claim and the said patent, that is to say the said Mexican grant to the said Jose Francisco Ortiz and Ignacio Cano, and the said patent therefor, should only be construed a quit-claim or relinquishment on the part of the United States aforesaid, and should not affect the adverse rights of any other persons whomsoever to have and to hold the said tract of land with the appurtenances unto the said defendant, The New Mexico Mining Company, and to its successors and assigns forever, with the exception, reservation and stipulation aforesaid.

18 And your orators further show that by reason of the facts above set forth, the said defendant, The New Mexico Mining Company, received the said letters patent, and the estate and property therein described and granted, as to the undivided one-half thereof, only in trust for, and to the use and benefit of the heirs-at-law of the said Ignacio Cano and their assigns, as hereinbefore set forth, and that the said defendant, The New Mexico Mining Company, as to the said undivided one-half of said estate and property, never acquired or possessed any beneficial right, use, property, estate or interest whatever in the said letters patent or under the same as in the land and property thereby granted.

And your orators further show that thereafter and in the year 1879, but at what particular day your orators are not informed and therefore cannot state, the said defendant, The New Mexico Mining Company, by a certain deed of conveyance by it executed, under its corporate seal and acknowledged and delivered to the said defendant, Stephen B. Elkins, purported and pretended to convey all and singular the said tract of land, so to it patented as aforesaid, to the said defendant, Stephen B. Elkins, in fee-simple; and that thereafter, as your orators are informed and believe, but at what particular time or by what particular instruments or other means, your orators are not informed and therefore cannot state, the said defendant, Stephen B. Elkins, purported or pretended to convey the said tract of land last mentioned, or some undivided part or parts thereof, or some rights, interests or claims respecting the said tract of land

or parts thereof to the said defendants, R. W. Donnell, Lars Anderson, Jerome B. Chaffee, and to one or more other persons to your orators unknown, but your orators are not informed and they have no means of ascertaining and therefore they cannot state at what particular time or in what particular manner or in what shares or quantities or in what estates or tenancies, such conveyance
19 or conveyances by the said Stephen B. Elkins, were made, and your orators cannot therefore state particularly concerning the same.

And your orators crave leave to refer to the said letters patent, and *by* the said deed of conveyance, so made by the said defendant, The New Mexico Mining Company, and to any and all instruments of conveyance so made by the said defendants, Stephen B. Elkins, when the same shall be produced before your honor; and your orators pray that they may have as soon as they can produce the same, and file true copies of the said letters patent as part of this bill of complaint.

And your orators further show on information and belief that the said defendants, The New Mexico Mining Company, Stephen B. Elkins, R. W. Donnell, Jerome B. Chaffee, Lars Anderson and Elias Breevort, and each of them before they or any or either of them accepted or received any of the deeds, instruments or conveyances aforesaid, and before they or any or either of them claimed or pretended to acquire any interest in the said tract of land last described, had notice of the said Mexican grant, so made as aforesaid to the said Jose Francisco Ortiz and Ignacio Cano, and of the rights of the legal representatives of the said original grantees derived under the said grant and said act of Congress confirming the same, and the said patent; and the said defendants, each and all had notice before such acceptance or receipt of any of the said deeds, instruments or conveyances and before the inception of any claim by them or any or either of them under the said letters patent; that the said defendants, The New Mexico Mining Company, as to the undivided one-half of the premises conveyed by said letters patent, being the one-half that had been owned by said Ignacio Cano, in his lifetime, never acquired any beneficial estate, right or interest under and by means of the said letters patent, and that by such means it acquired as to said undivided one-half, only the nominal or legal title
20 to the said tract of land, and as trustee of the heirs-at-law of the said Ignacio Cano, and for their sole use and benefit.

And your orators further show on their information and belief that the said defendant, The New Mexico Company, has yiel-ed the said occupation and possession of the said tract of land, so as aforesaid heretofore, enjoyed — it under the said letters patent to the said defendant Stephen B. Elkins, and that he, the said defendant, Stephen B. Elkins, had let into such occupation and possession of the said tract of land, in common with himself, the defendants, R. W. Donnel, Lars Anderson and Jerome B. Chaffee, and that the four last-named defendants, are now in occupation, possession and enjoyment of the said tract of land and claiming and receiving the rents, issues and profits thereof, to their own use, and to the exclusion of your orators

therefrom, and without their consent and against their objection and protest.

And your orators further show that the said tract of land contains much valuable growing timber and also many valuable mines and mineral beds of gold, silver, copper lead and coal, and that the same is of great value, to wit: of the value of one million dollars and upwards, and that the said defendants, Stephen B. Elkins, R. W. Donnell, Lars Anderson and Jerome B. Chaffee, as your orators are informed and beli-ve, are making preparations to cut and appropriate the said timber and to open and to operate the said mines and mineral beds, and to convert the mineral and other products of the said tract of land to their own use, and they threaten so to commit waste on the said tract of land, and to convert the said timber and the said mineral, and other products thereof, to their own use, without the consent and against the protest and objection of your orators, and your orators further show on information and belief, that the defendants, the said Stephen B. Elkins, R. W. Donnell, Lars Anderson and Jerome B. Chaffee, or some one or more of them, either severally or jointly or in connection with other person unknown to your orators, having entered into negotiations with divers persons to your orators unknown for the sale of the said tract of land, or a large part thereof, for a large sum of money, to wit: one million dollars; and the said defendants last named, threaten to make such sale and to execute and deliver a deed or deeds of conveyance of the said tract of land or a large part thereof accordingly.

21

And your orators hope that the said defendants, having notice and knowledge as aforesaid, of the said trust so existing as aforesaid, in your orators' behalf and of your orators' equitable right to the said letters patent, so as aforesaid issued, to the said defendant, The New Mexico Mining Company, and to the said tract of land therein described and thereby granted, would before this have recognized and acknowledged your orators' rights in the premises and yielded to them the possession and enjoyment of their interest in the said last-mentioned tract of land, and delivered and surrendered to them the said letters patent, and by proper deeds of conveyance assured to them their full, legal and equitable title to the said tract of land, as in justice or equity the said defendants ought long since to have done.

But now so it is, may it please your honor, that the said defendants, combining and confederating together and with divers persons, at present unknown to your orators, whose names when discovered your orators pray they may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orators in the premises, they the said defendants absolutely refuse to do equity towards your orators in the premises, or to comply with their repeated request in that behalf, and they at times pretended that your orators have not succeeded by inheritance or purchase, to any of the rights or interest of which the said Ignacio Cano died seized and possessed of, in or to the said mine of "Santa Rosalia," and the said

22

tract of land; but that the same were intended for the use and benefit of the said defendant, The New Mexico Mining Company, and its assigns.

Whereas your orators charge the contrary thereof to be the truth, and that your orator, Edward T. Farish, by virtue of the conveyance to him by said Teresa Cano Sandoval and her husband, and said Jose Maria Cano as hereinbefore set forth, of all their right, title and interest as heirs-at-law of said Ignacio Cano in and to said grant and lands thereby conveyed, has a good title to an undivided one-fourth thereof in fee-simple; that your orators, Benjamin M. Read, Larkin G. Read, Alexander Read, Modesto Ortiz and Theodora Ortiz de Martinez are each entitled to an undivided one twenty-eighth of said lands thereof.

All which actings, doings and pretenses of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orators in the premises.

In consideration whereof and forasmuch as your orators are remediless in the premises, at and by the strict rules of the common law and are relievable only in a court of equity, where matters of this nature are properly cognizable and relievable, to the end therefor- that the said New Mexico Mining Company, Stephen B. Elkins, R. W. Donnell, Lars Anderson, Jerome B. Chaffee and Elias Brevoort and their confederates, when discovered, also the said Nestor Sandoval, Marcos Ramirez, Luis Ortiz and Juan Ortiz the remaining defendants, may to the best of their respective knowledge, rememberance, information and belief, but not under oath full, true, direct and perfect answer make to all and singular the matters aforesaid as fully and particularly
23 as if the same were here repeated, and that it may be declared by this honorable court that your orators are entitled to the undivided interest above set forth in the said letters patent and in the land therein conveyed, that your orators be let into the possession and enjoyment of their said interest, that such of defendants as may be found clothed with the legal title to said lands, be declared and decreed to be trustees for your orators, to the extent of their equitable rights and interest as aforesaid, and be required to execute good and sufficient deeds with proper warranties to your orators, formally conveying to them all their said rights and interests, and may account to your orators for their proper share of all the rents, issues and profits derived by said defendants or either of them from said lands; and further, if it shall be made to appear to this honorable court that either of said defendants has conveyed or incumbered said lands or any part thereof or interest therein in such manner that it cannot be recovered or reclaimed, that such defendant may be decreed to account to your orators teerefor, and pay to your orators the full value of all such property, rights or interests lost to them by reason of any such conveyance or encumbrance, and that your orators may have such other and further relief as the nature of the case may require.

May it please your honor to grant unto your orators the writ of subpœna directed to each of said defendants, requiring them and

each of them personally to appear before this honorable court on the first day of the next term thereof, full, true and direct answer to make to all and singular the premises, and further to stand to, perform and abide such further order, direction and decree, as to the court shall seem meet.

JOHN D. POPE,
Complainants' Sol.
FRANCIS DOWNS,
Counsel and Sol. for Complainants.

24 TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

I, Benjamin M. Read, do solemnly swear, that I am one of the parties plaintiff in the foregoing bill of complaint, that I have read the same and know the contents thereof, and the facts therein stated are true of my own knowledge and belief, except as to the facts stated on information and belief, and as to these facts I believe them to be true.

(Signed) BENJAMIN M. READ.

Sworn and subscribed before me, this 29th day of January, A. D. 1883.

F. W. CLANCY, *Clerk,*
[SEAL.] By H. S. CLANCY, *Deputy.*

And afterwards, to wit: on the 1st day of February, 1883, the said complainants, by their said solicitors, filed in said clerk's office a copy of the patent referred to in said bill of complaint, which is in the words and figures as follows, to wit:

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas, under the provisions of the eighth section of the act of Congress, approved on the 22nd day of July, anno Domini, one thousand eight hundred and fifty-four, entitled: "An act to establish the offices of surveyor general of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes." A. Renschers, Elisha Whittelsey, Ferdinand W. Risque, Andrew J. O'Bannon, Charles E. Sherman, N. M. Miller, by C. E. Sherman, attorney-in-fact, and David Walker, as attorney and representative for Jos. T. Walker, on the twenty-seventh day of August, A. D. one thousand eight hundred and fifty-five, filed their petition with the United States surveyor general of the Territory of New Mexico, for his consideration and report in the matter of the "Ortiz grant," situated in the Territory of New Mexico.

25 And whereas it appears on the 8th day of November, A. D. one thousand eight hundred and sixty, John S. Watts, as attorney for the New Mexico Mining Company, filed an amended petition with the said United States surveyor general of the Terri-

tory of New Mexico, setting forth that "by virtue of an act of the legislative assembly of New Mexico, approved February 1st, 1858, the said petitioners were made and constituted a corporation and body politic under the name and style of the 'New Mexico Mining Company,' and as such are entitled to sue and be sued," and that, "in order that they may not be disturbed or molested in the prosecution of their business, ask that their title" to the said Ortiz grant, "be examined and approved and forwarded to Congress for final confirmation."

And whereas; it further appears that the said "Ortiz grant," was recommended for confirmation by the said United States surveyor general of the Territory of New Mexico, in his report dated the 24th day of November, A. D. one thousand eight hundred and sixty, and transmitted for the action of Congress, which said report is in words and figures as follows, to wit:

Decision.

Grant Ortiz mine.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *November 24th*, 1860.

This case was called up for examination on the 10th inst., by counsel for present claimants, was carefully investigated by this office and arguments heard from counsel. This grant of a mine is situated about 25 miles south of this city, in the Oso (Bear) mountain and called "Santa Rosalia." The original claimants, Jose Francisco Ortiz and Ignacio Cano, petitioned the first alcalde (magistrate) of Santa Fé, Territory of New Mexico, for a grant of
26 registration to this mine, and on the 18th of December, 1833, received possession in due course and form of law according to article 4th, title 3, Mining Ordinances, and the possession was given in the manner provided by title 8, said ordinance, 2d, 4th and 6th articles (Rockwell, p. 57) and said grantees obligating themselves to "work it for silver, gold, copper or anything else that God may be pleased to grant them."

"The parties then in legal form and in accordance with the provisions of the laws solicited a grant in accordance with the laws of the waters and the commons for the machinery and pastures. On this petition, the alcalde in the name of the Mexican nation, granted to said petitioners the Oso spring, and all the commons and pasture grounds within two leagues, measured from the mines to the four cardinal points.

There is a certificate of sale by Jose de Jesus Garcia and Rafael Alejo to Jose Francisco Ortiz and Ignacio Cano of a vein of gold which lies in the center of the mountain, for the sum of one hundred dollars in hand paid. This is a complete statement of the case, the validity of which is now to be determined. Was the land of a character to be granted or not? This is clear: The land was public domain, and granted under the several ordinances on the question of mines. (Rockwell, vol. 1.)

Had the grantors the power to make the grant? Francisco Baca y Ortiz was first alcalde, and therefore had the power to make the grant, this being a judicial matter (see Rockwell, page 177). Registry is the basis of a title to a mine (Rockwell, vol. 1, p. 173).

This office finds this to be a complete title and falls under the treaty of Guadalupe Hidalgo of 2nd February 1848—complete because granted by the proper officer as above stated, and in strict compliance to the mining ordinances and law on the subject.

27 In the case of The United States *vs.* Perchman, Peter's Report, it is held that when the people change their allegiance, their relations to their ancient sovereign are dissolved; but their relations to each other and their rights of property remain undisturbed.

These principles are fully sustained in the decision of the Supreme Court, reported in 17 Howard, pages 525, 576.

The present claimants, A. Recher, Elisha Whittelsey, Ferdinand W. Risque, Andrew J. O'Bannon, Charles E. Sherman, N. M. Miller and Thomas J. Walker, received possession by deed from John Greiner and his wife Laura, and by deed bearing date the 26th of December, 1883, the whole of this grant was conveyed to John Greiner.

This office is of the opinion that the present claimants have a full and complete title, and therefore approves of this grant, and recommends its final confirma- to the Congress of the United States.

The testimony taken in this case goes to prove the continuous occupancy of the land and the authenticity of the documents relative to the grant.

A. P. WILBAR,
Surveyor General."

"SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *November 4th*, 1860.

The foregoing is a true copy of the original on file in this office.

A. P. WILBAR,
Surveyor General."

And, whereas, it further appears that the "schedule, synoptical exhibit and brief" accompanying the aforesaid report of the United States surveyor general of the Territory of New Mexico, dated the 24th day of November A. D. one thousand eight hundred and sixty, designates in said claim, under No. 43, the New Mexico Mining Company as the names of the claimants;

28 And, whereas, it further appears that said private land claim was subsequently confirmed as No. 43 by the act of Congress, approved March 1st, A. D. one thousand eight hundred and sixty-one, entitled: "An act to confirm a certain private land claim in the Territory of New Mexico," which said act of Congress is in the words and figures as follows, to wit:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the private land claim in the Territory of New Mexico, as recommended for confirmation by the surveyor general of that Territory, and in his

report to the Commissioner of the General Land Office, of November 24th, 1860, designated as No. 43, be, and the same is hereby, confirmed; provided, that the foregoing confirmation shall only be construed as quitclaim or relinquishment on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

And, whereas, there has been deposited in the General Land Office of the United States, a return with the descriptive notes and plat of the survey of the said claim, confirmed as aforesaid, authenticated by the signature of the United States surveyor general for the Territory of New Mexico, which descriptive notes and plat of survey are in the words and figures as follows, to wit:

"UNITED STATES SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO.

I hereby certify that the 'Ortiz Mine grant,' entered as No. (43) forty-three in the surveyor general's report, dated November 24th, 1860, has been finally confirmed by the act of Congress approved March 1st, 1861, entitled: 'An act to confirm a certain private land claim in the Territory of New Mexico,' and that the same
29 has been duly surveyed according to the confirmation, containing sixty-nine thousand four hundred and fifty-eight acres and thirty-three hundredths of an acre, in towns-ip No. 12, 13 and 14, north of the base line of ranges 7 and 8, east of the New Mexico meridian; said survey having been executed by Thomas Means, deputy surveyor, and the field-notes of the same from which the foregoing plat (which is approved) has been prepared, having been examined and approved by me.

And I do further certify that in virtue of the said confirmation and survey, the said Ortiz Mine claim is entitled to a patent from the United States upon the presentation hereof to the Commissioner of the General Land Office for the said tract of land, the same being bounded and described as follows, to wit:

'Beginning at the centre point of the grant (which is in the mountain basin surrounded on all sides by mountains, latitude 35 deg. 20 min. north, variation 13 deg. 2 min. east, the village of Placer bearing north 61 deg. ½ deg. east, distance 76.00 chains from centre point) run east 61 chains, at 43 chains an arroyo course N. E.; at 60 chains met high mountains, course nearly east offset north, 4 chains, 75 links east, 4 miles, 35 chains, 66⅔ links; south 4 chains, 75 links to a point due east of centre point of grant. This base line from centre of grant to a point due east is 5 miles, 16 chains and 16⅔ links, being two Spanish leagues; at this point due east from centre set a stone 10 x 8 x 3 inches, marked C. P. and E. B., for centre point on east boundary of grant. Around this stone is a large mound of stones. The whole of base line is down east slope of mountains, gradual declination. This centre point on the east boundary is two chains north of bluff of mesa. From centre point on east boundary or point of beginning, run south along the east boundary of grant 2 chains to cliff of mesa, 10 chains in valley, 1 mile set a stone

15 x 7 x 3 inches, marked 1 E. B., for 1-mile point one east
30 boundary from centre point; this stone is in a mound of stones.
At 1 mile and 50 chains, land level. At 2 miles set a stone, marked 2 E. B., for 2-mile point on east boundary from centre point. At 2 miles, 16 chains and 23 links, intersected third correction line north 13 chains and 77 links west of corner to sections 35 and 36; township 13, north, range 8, east. At 3 miles, set a stone 9 x 7 x 2 inches, marked 3 E. B., for 3-mile point on east boundary. At 3 miles and 30 chains begin to ascend mesa; at 3 miles and 48 chains on mesa. At 3 miles and 49 chains descend mesa. At 3 miles and 54 chains ascend another mesa. At 4 miles set a stone 12 x 6 x 4 inches in mound of stone, marked 4 E. B., for 4 miles-point from centre or east boundary. At 4 miles and 40 chains, level prairie. At 5 miles set a stone 16 x 19 x 6 inches in mound of earth for 5-mile point, stone marked 5 E. B. At 5 miles, 16 chains and 66⅔ links set a stone 12 x 7 x 5 inches in mound of earth for S. E. corner of grant, stone marked S. E. C. Latitude of this cor. 35 deg. 16 min., variation 12 deg. 37 min. E. From S. E. corner of grant, run west along the south boundary of grant. At 1 mile set a stone 12 x 8 x 2 inches in mound of earth, stone marked 1 S. B., for 1 mile of south boundary from S. E. corner of grant. At 1 mile and 42 chains, old road leading to mines, course N. W. and S. E. At 1 mile, 77 chains and 50 links, road bears south. At 2 miles set a stone 12 x 4 x 3 inches in a mound of earth, marked 2 S. B., for 2 miles on south boundary from S. E. corner. At 3 miles set a stone 12 x 6 x 6 inches in mound of earth, marked 3 S. B., for 3-mile point on south boundary from S. E. corner of grant. At 4 miles set a stone 11 x 11 x 6 inches in a mound of stones, marked 4 S. B., for 4-mile point on south boundary. At 4 miles and 30 chains begin to ascend mountain nearly N. & S. At 4 miles set a stone 15 x 9 x 9 inches in mound of stones, marked 5 S. B., for 5-mile
point; this point on top of mountain is an arroyo. At 5 miles, 15
31 chains and 50 links, triangulate from mountain top to mountain top. Base 1 chain, angle 27 min., distance 427 chains and 32 links. Triangulate, base 1 chain, angle 1 deg. 13 min., distance 47 chains and 8 links. At 7 miles, 29 chains and ninety links, set a stone 24 x 12 x 6 inches on a large rock on mountain for point on south boundary, marked S. B., for south boundary. At 7 miles and 40 chains, many pits of miners, mines now at work, north of line stone black, indicating coal. At 7 miles, 44 chains and 15 links, offset north 14 chains and 50 links to avoid high mountain which extends out west. Thence west for the last 3 miles very high mountains south of line over some of which the line passes. At 8 miles and 10 chains, traces of mines, very rocky. At 8 miles and 66 chains, a number of houses to north of line on an arroyo 55 chains north of line. At 9 miles and 50 chains, on side of high mountain ridge (S. side). At 9 miles and 75 chains in bottom on west side of mountain. At 10 miles, 33 chains and 33⅓ links offset south 14 chains and 50 links to south boundary of grant, where set a stone 12 x 6 x 6 inches in a mound of stones, marked S. W. C., for southwest corner of grant. Latitude 35 deg.

16 min. north, variation 13 deg. 00 min. east, 10 miles, 33 chains and 33⅓ links, 4 Spanish leagues. From the S. W. corner of grant run north along the west boundary of grant. At 55 chains, land broken. At 1 mile set a stone 107 x 7 x 7 inches in a mound of earth, marked 1 W. B., for 1 mile on west boundary from S. W. corner. At 1 mile and 45 chains, road from mines to Algodones. At 1 mile and 55 chains, high bluff, north of which runs a creek E & W. At 1 mile and 58 chains, road runs E. and W. At 2 miles raised a mound of earth for 2-mile point on west boundary. At 2 miles and 40 chains, level prairie. At 3 miles raised a mound of earth for 3-mile point on west boundary. At 3 miles and 68
32 links, intersected third correction line north 7 chains and 70 links west of quarter-section corner in section 31, township 13 north, range 7 east. At 4 miles raised a mound of earth for 4-miles point on west boundary. At 4 miles, 42 chains and 50 links, crossed a road leading to mines from west. At 5 miles raised a mound of earth for 5-mile point on west boundary from S. W. corner of grant, in which placed a stone 14 x 6 x 2 inches, marked 5 W. B. At 5 miles and 10 chains, land became high. At 5 miles and 30 chains, level plain on top. At 6 miles set a stone 12 x 9 x 6 inches in a mound of stones, marked 6 W. B., for 6-miles point on west boundary. At 7 miles set a stone, marked 7 W. B., in mound of small stones, for 7-mile point. At 8 miles set a stone 12 x 9 x 3 inches, marked 8 W. B., for 8-mile point on west boundary. At 8 miles and 40 chains land broken. At 9 miles set a stone, 14 x 10 x 4 inches in mound of stones, marked 9 W. B., for 9-mile point. At 10 miles set a stone 17 x 10 x 7 inches in a mound of stones, marked 10 W. B., for 10-mile point on west boundary. At 10 miles, 33 chains and 33⅓ links set a stone 11 x 10 x 8 inches in a mound of stones marked N. W. C., for northwest corner of grant. Latitude 35 deg. 25 min. north, variation 13 deg. 01 min. east.

This corner stands on the east side of a sandy ridge. From the northwest corner of the grant, run east and along the north boundary of grant. At 27 chains an arroyo flows E. & W. At 40 chains, very rocky and broken. At 1 mile set a stone 27 x 7 x 12 inches, marked 1 N. B., for 1 mile on N. boundary from N. W. corner of grant. At 1 mile and 30 chains, a solid bed of rock. At 1 mile and 55 chains, top of rocky mesa. At 2 miles set a stone 15 x 9 x 5 inches, in mound of stone, marked 2 N. B., for 2-mile point on north boundary from N. W. corner of grant; this line for the last
33 2 miles over high mesas, sharp ridges and deep gulches, running northward from mountains. At 3 miles set a stone 14 x 10 x 2 inches in mound of stones, for 3-mile point on N. boundary, stone marked 3 N. B., for 3-mile point on N. boundary at 4 miles set a stone 24 x 14 x 3 inches in mound of stones, marked 4 N. B., for 4-mile point from N. W. corner. At 5 miles set a stone 13 x 9 x 5 inches in mound of stones, marked 5 N. B., for 5-mile point on north boundary. At 6 miles set a stone 13 x 13 x 3 inches in mound of stones, marked 6 N. B., for 6-mile point on north boundary. At 7 miles set a stone 17 x 15 x 10 inches in mound of stones, marked 7 N. B., for 7-mile point on N. boundary. At 7 miles and 40 chains,

descend from mesa to bottom; at 7 miles and 55 chains, as arroyo course N. E. At 8 miles set a stone 11 x 7 x 7 inches in mound of stones, marked 8 N. B., for 8-mile point on north boundary. At 8 miles and 42 chains, an arroyo course N. & S. At 9 miles set a stone 9 x 9 x 3 inches, in mound of stones, marked 9 N. B., for 9-mile point on north boundary. This corner stands on south bank of Galisteo creek, course N. W., 2 chains and 25 links wide from bank to bank, stream 55 links wide. At 9 miles and 12 chains to the middle of Galisteo creek, the line runs in the creek. At 9 miles 14 chains and 50 links the north bank of Galisteo creek. At 9 miles and 40 chains, ascend mesa from bottom. At 10 miles set a stone 24 x 18 x 17 inches in mound of stones, marked N. B., for 10-miles point on north boundary; this point stands on west side of mesa. At 10 miles, 3 chains and 33 links, top of mesa. At 10 miles and 9 chains bottom between mesas. At 10 miles, 21 chains on side of mesa. At 10 miles 29 chains and 75 links, an arroyo course S. W. At 10 miles, 33 chains and 33½ links, N. E. corner of grant. At that point set a stone 14 x 10 x 4 inches in mound of stones, marked N. E. C., for N. E. corner of grant,
34 being 4 Spanish leagues from east to west. Beginning at the center point on east boundary of grant, latitude 35 deg. 20 min., variation 12 deg. 59 min. east. At 40 chains hollow down the side of mesa. At 1 mile set a stone 19 x 14 x 5 inches in mound of stones, marked 1 E. B., for 1 mile on east boundary from center point. At 1 mile and 40 chains down north side of ridge. At 2 miles set a stone 11 x 6 x 7 inches in mound of stones, marked 2 E. B., for 2-mile point on east boundary from center point. At 2 miles and 45 chains land begins to descend towards creek. At 3 miles set a stone 14 x 11 x 7 inches in a mound of stones, marked 3 E. B., for 3-mile point from center point on east boundary. At 3 miles and 5 chains, cross road from Galisteo to the Placer mines, course S. W., an arroyo just south of road, course N. E. At 3 miles and 30 chains, ascend a ridge E. & W. At 3 miles and 65 chains, an arroyo course N. W. At 4 miles set a stone 24 x 14 x 7 inches in mound of stones, marked 4 E. B., for 4-mile point from center point on east boundary; here is a large pile of huge stones on line. From the 4-mile point run a random line north. At 4 miles, 40 chains and 50 links, Galisteo creek, course S. W. At 4 miles and 43 chains, a rock 50 feet high. At 4 miles and 45 chains, top of rocky mesa. At 5 miles set a stone 12 x 7 x 5 inches in a mound of stones, marked 5 E. B., for 5-mile point on east boundary from center point. At 5 miles, 17 chains and 2 links, intersected north boundary 55 links west of N. E. corner of grant, correct back on line, at 17 chains and 2 links, more stone and mound of stones 45½ links east. At 5-miles point the true bearing from 4-mile point on east boundary to N. E. corner of grant is N. 89 deg. 58 min. E., distance 97 chains. At 5 miles and 17 chains, closed survey on N. E. corner of grant, whole distance from center point on E. boundary to N. E. corner of grant is 5 miles and
35 17 chains; closed survey on N. E. corner of grant, August 14th, 1861. Latitude 35 deg. 25 min. N., variation 13 deg.

01 min. east, containing sixty-nine thousand four hundred and fifty-eight acres and thirty-three hundredths of an acre.

In witness whereof, I have hereunto signed my name, there being no official seal of my office provided by law, at the city of Santa Fé, New Mexico, this 25th day of September, 1861.

A. P. WILBAR,
Surveyor General, New Mexico."

And whereas, it further appears that the foregoing survey of the "Ortiz Mine grant" approved by the surveyor general of the Territory of New Mexico, on the 10th day of September, A. D. 1861, was in conflict with the survey of the private land of Jose Serafin Ramirez, known by the name of the Cañon del Agua grant, approved by the surveyor general of said Territory on the 16th day of October, 1866, the said Cañon del Agua grant having been confirmed as No. 70 by the act of Congress approved June 12th, A. D. 1866, and that by a deed dated on the 16th day of March, A. D. 1875, signed by Samuel Norment, president, and counter- by Zadoc Staab, secretary, for and in behalf of "the New Mexico Mining Company," as owners of the said Ortiz Mine grant, released, relinquished and forever quitclaimed unto the owners of the said Cañon del Agua grant, whosoever they may be, their heirs and assigns forever, all their estate, right, title and interest, both legal and equitable of, in and to all portion of the said Cañon del Agua grant, as represented on a survey thereof, approved October 16th, A. D. 1866, by John A. Clark, then surveyor general of the Territory of New Mexico, which may lie within the limits of the said Ortiz Mine grant, as located by a survey thereof, approved September
36 10th, A. D. 1861, by A. P. Wilbar, then surveyor general of said Territory, estimated at about 259 acres. Whereupon a patent was issued for the said Cañon del Agua grant in favor of the said Jose Serafin Ramirez, his heirs and assigns, on the 1st day of July, A. D. 1876, for the said survey approved on the 16th day of October, A. D. 1866, by the surveyor general of the Territory of New Mexico.

And whereas the Secretary of the Interior, by a decision dated April 22d, A. D. 1876, in the matter of the appeal of the said New Mexico Mining Company, from the decision of the Commissioner of the General Land Office of June 19th, A. D. 1875, directed that a patent issue to the claimants of the said Ortiz Mine grant, "excepting from the patent so much of the grant as appears to be included within Cañon del Agua, estimated at 259 acres" patented as aforesaid.

Now know ye, that the United States of America, in consideration of the premises and pursuant to the second section of the act of Congress, approved the third day of March, A. D. 1869, entitled "An act to confirm certain private land claims in the Territory of New Mexico," have given and granted, and by these presents do give and grant unto the said New Mexico Mining Company, and to its successors and assigns, the tract of land embraced and described in the foregoing survey, excepting and reserving from the transfer by these

presents so much of the land embraced in the said survey as is included within the survey of the Cañon del Agua grant, approved by the surveyor general of New Mexico, on the 16th day of October, A. D. 1866, and patented to Jose Serafin Ramirez, his heirs and assigns, on the 1st day of July, A. D. 1875, and estimated to contain about 259 acres as aforesaid, and with the further stipulation, that in virtue of the provisions of the aforesaid act of Congress,
37 approved March 1st, A. D. 1861, the confirmation of this said claim and this patent shall "only be construed as quitclaim or relinquishment on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever."

To have and to hold the said tract of land with the appurtenances unto the said New Mexico Mining Company, and to its successors and assigns forever, with the exception, reservation and stipulation aforesaid.

In testimony whereof, I, Ulys-es S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this 20th day of May, in the year of our Lord 1876, and of the Independence of the United States the one hundredth.

By the President:

[SEAL.] U. S. GRANT,
By D. S. CONE, *Secretary.*

J. M. ARMSTRONG,
Recorder of the General Land Office, ad Interim.

D.

(4–225.)

DEPARTMENT OF THE INTERIOR, W. H. W.
GENERAL LAND OFFICE, J. B. L.
WASHINGTON, D. C., *Jan. 30th*, 1883.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of a patent dated May 20th, 1876, in favor of the New Mexico Mining Company, is a true and literal exemplification from the records of this office.

In testimony whereof, I have hereunto subscribed my
38 name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of the General Land Office.

And afterwards, to wit: on the 23d day of February, 1884, the said defendants, The New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee and Lars Anderson, filed in said clerk's office, by their solicitors, their answer to said bill of complaint, which said answer is in the words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

In the District Court of the First Judicial District of the Territory of New Mexico, Sitting within and for the County of Santa Fé.

EDWARD T. FARISH *et al.*
vs.
THE NEW MEXICO MINING COMPANY *et al.* } No. 1490. In Chancery.

The Joint and Several Answers of the New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee, and Lars Anderson to the Bill of Complaint of said Complainants.

These respondents now and at all times hereafter, saving and reserving all manner of benefit and advantage to themselves of exception to the many errors and insufficiencies in said bill contained, for answer thereto or unto so much or such parts thereof as these respondents are advised is material for them to make answer unto: They answer and say: They admit that Jose Francisco Ortiz and Ignacio Cano registered in the office of Francisco Baca y Ortiz, the constitutional alcalde of Santa Fé, the mine designated as "Santa Rosalia" in said bill of complaint at the time therein stated,
but they only prayed (instead of asking for a grant in
39 terms) that said constitutional alcalde should provide for
their said petition in accordance with the ordinances on mining. They admit that said constitutional alcalde admitted the said petition of said Ortiz and Cano, and placed them in possession of the said mine, after having examined and taken proof in the premises, as described in said bill of complaint; they admit that after said possession was given by said constitutional alcalde, the said Ortiz and Cano represented to said alcalde, that they were authorized to be invested with necessary water supplies and issues for the working of machinery and the pasturing of the cattle to be used in connection with the working of said mine of "Santa Rosalia," and to the end petitioned the said alcalde for the same to be given to them in possession and that said alcalde (so far as he was competent to do so) granted to the said Ortiz and Cano for the said purposes the land adjacent to the said mine of "Santa Rosalia," four leagues square, that is to say: two leagues each way to each cardinal point of the compass from the said mine, but without any detriment to third persons; and placed them in possession thereof (so far as he was able to do so) for the purposes referred to, all of which said facts will more fully appear by reference to a translated copy of the original papers given by said Jose Francisco Ortiz in the premises, a copy of which respondents pray leave to file hereafter, and that the same may be taken and considered as a part of their answer.

Respondents neither admit nor deny that by the said acts and things done as stated in said bill of complaint, the ownership and title of said mine and of the tract of land, four leagues square be-

fore referred to, became invested in said Ortiz and Cano and their assigns, as alleged in said bill of complaint, but they allege as they are advised that the said acts and doings of said Caño and Ortiz, and the said alcalde in the premises did vest in the said
40 Cano and Ortiz an inchoate title and equitable estate in said mine and lands for the purposes mentioned. Respondents deny that by the laws of the Republic of Mexico, and the treaty of Guadalupe Hidalgo referred to, the said Cano and Ortiz acquired any title to the mines within the limits of the said land, except the "Santa Rosalia mine," but admit that a grant, release, relinquishment or quitclaim to the said grantees or their legal representatives by the Republic of Mexico or its successor, the United States, was necessary in order to vest in the said grantees and their legal representatives the full and absolute title in fee-simple in and to said mines, and they also state that such release, relinquishment or quitclaim was necessary and requisite to vest in the said Cano and Ortiz and their legal representatives, a full and absolute title to any part or portion of the said "Santa Rosalia" mine, or said four leagues square of land adjacent thereto.

They admit that the said Ortiz and Cano, by reason of the grant aforesaid, became and were tenants in common of the said mine and adjacent land, and that each was the owner of an undivided one-half interest thereof, and that such title thereto has been granted by the Republic of Mexico, and that they entered into the possession of the said mine and land as such tenants in common, and occupied and enjoyed the same together, but they deny that they continued to occupy and enjoy the same until the death of the said Cano, which occurred about the year 1836; but they allege the truth to be that long before the death of the said Ignacio Cano (the exact time being to these respondents unknown), that the said Cano sold and conveyed his interest in and to said mine of "Santa Rosalia" and the lands adjacent thereto, to his cotenant, Jose Francisco Ortiz, and then and there delivered the possession of the said premises to the said Ortiz, and that the deed conveying said premises from the said Cano to the said Ortiz, has been lost or mislaid and can-
41 not now be filed with this answer; and that after the execution and delivery of the said deed by the said Cano, that neither the said Cano nor any of his heirs were ever in possession, occupation, control or management of any part or portion of the said premises, but that they at all times, except as hereinafter stated, acknowledged and recognized the title to the entire premises to be in the said Ortiz and his legal heirs and assigns.

They admit that the said Ortiz continued to hold possession of the said mine and lands connected therewith, not only from the death of the said Cano, but from the time of the execution of the deed thereinbefore referred to, but they deny that the said Ortiz held said possession for the use and benefit of the heirs-at-law of the said Cano, but allege that he held the same claiming to be the owner thereof. They admit that the said Ortiz on or about the year 1848, died, but the exact time of his death they cannot now state. Respondents are not informed as to the exact date of the death of the

said Cano, but are informed and believe that he died some time between the year 1841 and the year 1846, but as to whether or not he died intestate these respondents are unable to state, and are without information and therefore deny the same and demand strict proof thereof.

They deny that he left as his only heirs five children, namely: Maria Antonia Cano, Teresa Cano, Ignacio Cano, Ignacio Cano, and Jose Maria Cano, and they deny that said persons or any or either of them were the children or the heirs of the said Ignacio Cano, deceased, or in any manner entitled to his estate, or to hold and possess the same either in law or in equity.

They deny that the said Maria Antonia Cano was twice married; that she had one son by her first husband whose name was Sandoval, and one by her second husband whose name was Ramirez, and that said children are now residents of Las Animas county,
42 Colorado, and all of the allegations in said bill in relation to said children.

They deny that the said Teresa Cano intermarried with Antonio Sandoval about the year 1847, and that she and her said husband are still living. Denies that they co-veyed any interest in said premises to said complainants, Edward T. Farish or that they had any ieterest whatever to convey.

They deny that the said Ignacia Cano, daughter of the grantee Cano, was twice married; that by her first husband she has three and by her second husband four children, all of whom are complainants in this action, and they deny that the person known as Ignacia Cano, the mother of the said complainants was a daughter or heir, or in any manner whatever related to the said grantee, Ignacia Cano.

They deny that the person known as Ignacio Cano, the younger, was in any manner related to the said grantee, Ignacio Cano, and that as to whether said person disappeared from the Territory of New Mexico, about the year 1860, and that since said time, he has not been heard from, and is now dead, your respondents are uninformed, and therefore require strict proof of the same.

They deny that the said person known as Jose Maria Cano, and described as the last of the five children of the said Ignacio Cano, was the child of the said Ignacio Cano, and they deny that he ever sold or conveyed any interest or pretended interest in the premises in dispute to the said complainant, Edward T. Farish.

That as to whether or not said defendant, Elias Brevoort pretends that the said Jose Francisco Ortiz died intestate, these respondents are uninformed, and they therefore deny the same, and require strict proof thereof, if it shall be deemed that
43 said allegation is material, but these respondents say that it is true that the said Jose Francisco Ortiz, prior to the time of his death, to wit: on the 15th day of August, A. D. 1841, made and executed his last will and testament, and which said will and testament was in full force and had not been revoked or annulled at the time of the death of said Jose Francisco Ortiz, but was and is a good and valid will and testament according to the laws and

customs in force in New Mexico, at the time of the date of said will and the death of the said Jose Francisco Ortiz; that under and by virtue of the terms of said will, the said Jose Francisco Ortiz made and constituted Maria Ynez Montoya, commonly called Maraquita Montoya, at that time his wife, as his sole and only heir to all of his property which he held or possessed at the time of his death, of whatever class or description the same might be, a copy of which said last will and testament marked "Exhibit A" is herewith filed and made a part of this answer, and respondents here state the fact to be that under and by virtue of said last will and testament, the said Maria Ynes Montoya became and was possessed of all the right, title, estate and interest which the said Jose Francisco Ortiz, at the time of his decease held and possessed either legally or equitably in and to the mine and land in question, and she thereupon took possession of the same, claiming the same under and by virtue of the terms of said last will and testament, and from the date of the decease of said Jose Francisco Ortiz to the present time, she and her assigns have held possession of and claimed the said mine and lands in question by virtue of the said will and testament and divers and sundry deeds of conveyance purporting to convey an estate in fee-simple in and to the mine and lands in question, and that no claim by suit, either in law or equity, effectually prosecuted, prior to the filing of complainant's bill of complaint, has ever been set up
44 or made to the said mine, lands, tenements and hereditaments in question, and that the said Maria Ynes Montoya and her assigns have from the said date of the decease of the said Jose Francisco Ortiz, hitherto held, occupied and possessed the said mine and land in question, solely and exclusively, and so held, occupied and possessed the sole and exclusive possession of the mine and land in question constantly and without interruption in any manner whatever from any one for a period of more than thirty (30) years next preceding the date of the filing of said bill of complaint, claiming the same as their own under color of title and otherwise as before stated.

They admit that the said New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee and Lars Anderson claimed that the said Jose Francisco Ortiz claimed title to said premises as hereinafter more particularly set forth, by virtue of conveyance from the widow of Jose Francisco Ortiz.

They further deny that any of the persons mentioned as children or heirs of the said Ignacio Cano have at any time since the conveyance by the said Ignacio Cano, occupied, held or possessed any portion of the mine and land in question, or have ever, in any legal way, claimed or pretended to claim, except as hereinafter stated, any right or title in and to the mine and land in question or any part thereof, and they further deny that any of the said children, or heirs, or their assigns have at any time, by any deed or deeds of conveyance duly made, executed, acknowledged or delivered to complainants, for any valuable consideration, duly granted, bargained, sold or conveyed to the said complainants, or any of them, or any one else, any right, title, interest or claim in and to the said mine

and the privileges, premises and lands, as stated in said bill
45 of complaint, and they state the fact to be that if any of said pretended children or heirs of said grantee, Ignacio Cano, have ever made or pretended to make, execute and deliver any deed or deeds of conveyance to the whole or any part of the mine and land in question, that such deeds were made without any due and lawful consideration and under an illegal and champertous bargain and contract, and at a time when neither of them had a right to make any deed of conveyance to the whole or any part of the mine or land in question, and if any of such deeds have been *and* delivered to said complainant, Edward T. Farish, the same are wholly illegal and void, and confer upon the said Edward T. Farish, no right to maintain or claim any interest, either legal or equitable to the whole or any part of the mine and land in question.

Respondents admit that in conformity with a certain act of Congress of the United States, approved July 2d, 1854, mentioned and referred to in said bill of complaint, the surveyor general of the Territory of New Mexico investigated the matter and title to the land and mine in question, and examined, considered and determined upon the fact and validity of the said grant, and they also alleged that he considered and determined as to the title to the said mine and lands in question, and as to who was the then owner thereof, and on the 24th day of November, A. D. 1860, he duly made his report and decision pursuant to said act of Congress, and therein and thereby he determined and decided the said grant to be authentic and valid; and respondents here state the fact to be that in said report and decision, it was decided that the then claimants, A. Rencher, Elisha Whittelsey, Ferdinand W. Risque, Andrew J. O'Bannon, Charles E. Sherman, N. M. Miller and Thomas J. Walker, (they being the same persons who had petitioned the said surveyor general for the confirmation of said title) had at the time a full and
46 complete title to the said property; said surveyor general therefore approved said grant, and recommended its final confirmation by Congress; they further state the fact to be that the said parties who petitioned the said surveyor general for the confirmation of the said grant, exhibited their title to the same to the said surveyor general, who received them in evidence and considered and passed upon them in making up and coming to his decision in the premises in accordance with the 8th section of the act of Congress aforesaid; they further state the fact to be that the said petitioning claimants had, by an act of the legislative assembly of the Territory of New Mexico, approved February 1st, 1858, been made and constituted a corporation and body politic under the name and style of "The New Mexico Mining Company;" that after the said corporation was formed, the said petitioning claimants transferred and conveyed the mine and property in question to the said company, but they deny that said surveyor general decided said mine and lands to belong to, or be the property of all or any one or more of the said persons from whom said complainant claims to have purchased and received the conveyance of the same.

Respondents admit that in pursuance of the aforesaid act *of* Congress on the 1st day of March, A. D. 1861, passed another act confirming the said claim of the above-mentioned A. Rencher, Elisha Whittelsey, Ferdinand W. Risque, Andrew J. O'Bannon, Charles E. Sherman, N. W. Miller and Thomas J. Walker, but deny that said confirmation operated in any manner to confirm said claim for the benefit of any one else than the person last above mentioned and the said New Mexico Mining Company and its and their as-
47 signs; for a more particular description and understanding of the said act, reference is hereby made to the same in chapter 66, page 887, vol. 12, U. S. Statutes at Large, which said act is hereby made a part of this answer, a copy being filed herewith.

Respondents deny that the said act of confirmation operated as a new and enlarged grant to any one except to the said A. Rencher and six others above named as petitioning claimants and to the said New Mexico Mining Company and their assigns, and they admit that as to the said Rencher and others, and to the said New Mexico Mining Company and their assigns, said act of confirmation did confer upon, and vest in them and their assigns a full and absolute title in fee-simple in and to said tract of land and all the mines thereon.

Respondents admit that said tract of land was surveyed at the time and as stated in said bill of complaint and that the same was approved by the Commissioner of the General Land Office as therein stated, and respondents here state the fact to be that the mine in question was a permanent, fixed monument, and the boundaries of the said grant being two Spanish leagues north and south, east and west from the initial point were necessarily fixed and easily determined by any one and not in any manner uncertain or impossible to ascertain, even without an official survey, as will more fully appear by reference to the act of juridical possession of said mine and said lands.

Respondents admit that the whole of said lands is situated in the county of Sante Fé, and is particularly described in said bill of complaint.

Respondents positively deny that the said defendant, The New Mexico Mining Company, at any time whatever wrongfully, falsely or fraudulently declared or represented to any one whomsoever that the said company had acquired by purchase from any one whomsoever the property in question, but they state the fact to be that
48 the said defendant, The "New Mexico Mining Company" has acquired the whole of the title and estate to the whole and every part and portion of the mine and land in question, and so represented and claimed the same, but they deny that any such representations or declarations were either wrongful, false or fraudulent; and they further state the fact to be that the said defendant, The "New Mexico Mining Company," and those holding under it, through divers conveyances have acquired by purchase from the legal representative, legatees and devisees and assigns of the said Jose Francisco Ortiz, the whole of the said mine and lands in question, and that the said "New Mexico Mining Company" does come

within the scope and intent of said act of confirmation and was entitled before the sale and conveyance by it to be recognized by the United States and all lawful authorities as the sole and only assign and owner of the said original grantees' interest in said mine and land in question, and as the sole lawful claimant for the said grant of land and mine, and entitled to letters patent therefor from the United States; the said New Mexico Mining Company having acquired the title to the same by purchase and conveyance to it from the said Rencher and others, prior to the confirmation thereof by said act of Congress of March 1st, A. D. 1861, a schedule, synoptical exhibit and brief of which was transmitted by the surveyor general of New Mexico along with his decision and a copy of the original grant papers and conveyances, and was before the Congress at the time of its confirmation of the title in question as a part of the decision and report of said surveyor general, a copy of which is herewith filed and made a part of this answer.

Respondents admit that the said New Mexico Mining Company did apply for letters patent to be issued in its name for all and singular the said tract of land by the President of the United
49 States, but they deny that it did so upon any false and fraudulent declarations, representations or suggestions to any one whomsoever.

Respondents admit that 259 acres, more or less, of the land in question were included in the patent to the Cañon del Agua grant of land, and were not included in the patent for the land in question herein.

Respondents absolutely deny that any of the declarations, representations or suggestions of the said New Mexico Mining Company with reference to the property in question, or to the title to the same were either false or fraudulent, or that said company knew that such were false or fraudulent.

Respondents admit that the President of the United States issued and delivered letters patent to the New Mexico Mining Company for the property in question, except the 259 acres aforesaid, on the 20th day of May A. D. 1876, but they deny that he was induced and misled to do so by any false or fraudulent representations, or that he had any intent to issue said letters patent to the said complainant or any of the persons under whom he pretends to claim title, or that he intended to issue the same to or for the use and benefit of any other person than the New Mexico Mining Company, which had become the claimant for said land by virtue of the conveyance to it by said A. Rencher and the said six other petitioning claimants, and to which the title to the said land in question had been confirmed by the decision of the said surveyor general and by the act of Congress of March 1st, A. D. 1861.

Respondents deny that the said grant to Ortiz and Cano and the examination by the surveyor general are recited in said patent, but admit that the report and survey of the surveyor general respecting the same and the act confirming the same and the conflict of
50 description respecting the said 259 acres were all recited among other things in said patent, and they further state the fact to

be that not only the foregoing matters and things were recited in the said patent, but there were many other matters and things recited in the same with reference to the title to the said mine and lands, the tenor of which was to show that the said patent was properly issued, as will more fully appear by reference to a copy of said patent which is hereby made a part of this answer and which the said defendants now pray leave to hereafter file herewith, the same not being at present in their power, possession or control.

Respondents admit that the United States, by said patent, gave and granted to the said New Mexico Mining Company the tract of land and mine in question, as stated and set forth in said bill mentioned.

Respondents further admit that the said New Mexico Mining Company did occupy, possess and enjoy the said tract of land as patentee thereof, and remained and continued in possession and enjoyment thereof under the same claim until it sold, transferred and conveyed the same to the said defendants, Elkins and Chafee, and they further state the fact to be that not only has the said New Mexico Mining Company occupied, possessed and enjoyed the said mine and land from and ever since the day of the issuance of the patent thereof to it, but that the said New Mexico Mining Company has also occupied, possessed. held and enjoyed the said mine and land under a claim of right and title thereto ever since the date of the creation and organization of said company as a corporation in the year A. D. 1858, without any interruption or interference from any one whatever and without any suit either in law or equity for the possession thereof being commenced and successfully prosecuted against it, or any suit whatever instituted as herein stated.

51 Respondents absolutely deny that by reason of the facts set forth in said bill of complaint, or for any other reason, that the said New Mexico Mining Company received the letters patent and the estate and property therein described and granted as to the one-half thereof only in trust for and to the use and benefit of the heirs-at-law of the said Ignacio Cano, or for any of the other assigns, except for those claiming under the original deed made by the said Cano to the said Ortiz as hereinbefore stated.

They deny that the said New Mexico Mining Company as to the said one-half of said estate and property held by the said Cano, ever acquired or possessed any beneficial right to this property or estate or interest in said letters patent or under the same or in the land or property thereby granted.

Respondents deny that the said complainants or any other person, except the New Mexico Mining Company, was at the time of the issuance of the said letters patent in any manner a representative or assign of the interest of the said Cano, or of the said Mexican grant by virtue of any deeds or anything whatever, but state the fact to be that the said New Mexico Mining Company was the only legal representative and assign of the said Ortiz and Cano and of said grant of land, and the only owner of the said grant of land at the time of the issuance of the said patent, and the only person to whom said patent could lawfully issue at the date thereof.

Respondents absolutely deny that the said complainant or his pretended assignors or either of them was such a person as the lands included in said patent was intended to be confirmed, assured or granted to by the said act of Congress, or that they or either of them, (said complainant and his pretended assignors) were entitled
52 to receive and enjoy said letters patent or the estate and property thereby intended to be granted or confirmed, or that the said complainant or his assignors ever had, held or possessed any estate either legal or equitable in and to the lands in question or any part thereof.

Respondents deny absolutely that the said New Mexico Mining Company either received said letters patent, or occupied, possessed or enjoyed the estate and property therein described and granted either in part or in whole in trust for the use and benefit of complainant- in any respect whatever, or that the said company never acquired or possessed any beneficial right, use, estate, property or interest whatever in and to an individed one-half of the land so conveyed, or in the said letters patent or thereunder or in the lands and property thereby granted.

Respondents admit that the New Mexico Mining Company, by deed of conveyance by it executed did convey to Stephen B. Elkins and Jerome B. Chaffee, but not to Stephen B. Elkins alone, the tract of land so patented as aforesaid in fee-simple, and that the said Stephen B. Elkins and Jerome B. Chaffee now hold the title to the said land as trustee- for themselves, the respondent Lars Anderson and other persons who contributed their portion or share of the purchase-money for the same, so that the same is now held, possessed and owned by the said Stephen B. Elkins and Jerome B. Chaffee as trustees for themselves and their associate owners, but they deny that said R. W. Donnell owns or possesses any estate, right, title and interest in and to any part or portion of said land, and they deny that any estate or interest whatever has ever been transferred or conveyed to him in said lands or any part thereof.

53 Respondents admit that before they or any of them received or accepted any of the deeds of conveyance to them, and before they or any of them claimed or acquired any interest in the said tract of land, they had notice of the said grant to Ortiz and Cano, but they deny absolutely any notice of any rights whatever, either legal, equitable or pretended of any persons claiming to be legal representatives of the said Ortiz and Cano, derived under the said grant or said act of Congress confirming the same or the said patent, except that they did have notice that the said Maraquita Montoya was the sole and only heir and legatee and devisee and legal representative of said Ortiz and Cano as their successor in the title to the land in question prior to the time of her sale and conveyance thereof to the said John Greiner, including the said A. Rencher and his associates, the said New Mexico Mining Company, these respondents and their associate owners who have owned, held or had any rights or estate whatever in or to the lands in question or any part thereof.

Respondents absolutely deny that the said New Mexico Mining

Company never acquired or possessed any beneficial estate, right or interest under or by means of the said letters patents to the undivided one-half interest of said tract of land, which had been granted to the said Ignacio Cano, or that by such means it only acquired the same in trust for the heirs of Ignacio Cano.

Respondents admit that the said New Mexico Mining Company yielded the occupation and possession of the said lands to its vendees, Elkins and others, and that the same is now in the possession and occupation of said respondents, Elkins, Anderson, Chaffee and their associate owners, but not of said Donnell, and that they are claiming and enjoying the said tract of land, together with the rents, issues and profits thereof to their own use, and to the exclu-
54 sion of said complainants and every one else, and that they and those through whom they claim from and including the said Maraquita Montoya, have at all times since the death of the said Jose Francisco Ortiz, held, possessed, occupied and enjoyed, solely and exclusively, the said entire tract of land and the rents, issues and profits thereof, and without the consent of the said complainants or his pretended vendors, never at any time had held or possessed any right, title or estate or valid claim, either in law or equity, to any part or portion of the said land in question, and that his or their consent was in no manner material or necessary to the said respondents, and that those through whom they claim title to the occupation, possession and enjoyment by said respondents of the lands in question; and they further state the fact to be, on information and belief, that neither the said complainant nor any of his alleged or pretended vendors, ever at any time heretofore, prior to the filing of said bill of complaint, made any legal objection or protest against said respondents and those through whom they claim title to the lands in question as aforesaid, occupying, possessing, holding or enjoying the whole or any part or portion of the land in question as against them or any one else.

Respondents admit that the said tract of land contains much valuable and growing timber and also many valuable mines and mineral beds of gold, silver, copper, lead and coal, and that the same is of great value, but of what value they are not informed, and therefore are unable to state the same; they also admit that said respondents and their associate owners are preparing to open and operate some of the mines and mineral beds and convert the said mineral thereof to their own use, but they deny that they are cutting or using the same, except where the same may be requisite and necessary in opening and working the mines and min-
55 eral beds aforesaid, and they absolutely deny that they have or are threatening to commit any waste on the said tract of land; on the contrary, they state that since the purchase of the property by them and their associates, they have spent in improving and developing the same about $50,000, besides paying the taxes thereon; they admit that they do intend and propose to convert the said timber, minerals and other products thereof to their own use without obtaining the consent of said complainants, as they do not recog-

nize in them any right either to consent, protest or object to the use thereof.

Respondents admit that they have entered into negotiations at times since the purchase of said grant for its sale, but that said negotiations have come to naught and have not resulted in the sale of same.

Respondents absolutely deny that they or any of them have had any notice or knowledge of any trust existing as pretended, claimed and stated in said bill of complaint in said complainants' behalf, and they further deny that any such trust ever has existed, or that the said complainant- *has* or ever *has* had any right, either legal or equitable, to the said letters patent issued to the New Mexico Mining Company or to the tract of land therein described and conveyed.

Respondents absolutely deny any and all combination or confederation either among themselves or with any one else, as stated in the said bill of complaint, or that they have contrived how to wrong or injure the said complainant- in the premises, or that they have refused to do equity toward the said complainants in the premises, hereby denying that they are entitled to any equitable relief in the premises; they deny that said complainants have made any repeated requests or any requests whatever of them in the premises, except so far as the same is made in and by their said bill of complaint, or that they have any right on which to base any said request, and they not only pretend now but have
56 at all times heretofore and still do deny absolutely that the said complainant- *is* the assign- of all or any part or portion of the estate, right, title and interest and claim, whereof the said Jose Francisco Ortiz died seized or possessed of, in or to the mine and tract of land in question; they admit that they pretend and do here state as a fact that said Maraquita Montoya, deceased, whose true name was Maria Ynes Montoya, the widow of the said Jose Francisco Ortiz, inherited the said mine and tract of land as sole and only heir, legatee and devise- of said Ortiz, and that she thereafter conveyed the same to the said John Greiner, and that the said John Greiner conveyed the same to the said Abraham Rencher, Elisha Whittelsey, Ferdinand W. Risque, Andrew J. O'Bannon, C. E. Sherman, N. M. Miller and Thomas J. Walker, and that thereafter the said last-named persons or their assigns conveyed the same to the said respondent, the said New Mexico Mining Company, prior to the conveyance thereof by the said company to the said Elkins and Chaffee; they also admit that they do pretend and do here allege and state the fact to be that before the said conveyance, she had acquired the same mine and tract of land by means of a will and testamentary writing and instrument executed by the said Jose Francisco Ortiz in his lifetime, and they further admit that they do pretend and here estate the fact to be that the said letters patent were not intended for the benefit of the said pretended vendors of said complainant-, but that the same were intended for the benefit and use solely of the said New Mexico Mining Company and its assigns, as the legal and only owners thereof in law and equity,

from the said Jose Francisco Ortiz and said Maraquita Montoya, who was his sole and only heir and legal representative by virtue of the will aforesaid, and were also the owners thereof by virtue of having possessed, occupied, held and enjoyed by themselves and their assignors and vendors continuously and without
57 interruption from the date of the death of said Jose Francisco Ortiz to the day of the date of said letters patent and to the date of the filing of said bill of complainant, the said tract of land and mine, claiming title to the same under the said original grant and grantees, their heirs and assigns by and through said will and various deeds of conveyance, purporting to convey in fee-simple the entire estate and title in and to said mine and tract of land; and they admit that they do pretend and here state the fact to be that the said Elkins, Chaffee, Anderson and their associate owners, and no one else, are the lawful owners and holders of said timber, mineral and other products and of all the rents, issues and profits of said tract of land, and as such are entitled to appropriate and enjoy the same to their own use and to the total exclusion of the said complainants.

Respondents absolutely deny that said complainants are in any manner whatever legal representatives or assigns of the said Jose Francisco Ortiz or Ignacio Cano, with respect to the said grant, or that they are in any manner entitled to any benefit or advantage of said act of confirmation or letters patent.

Respondents further deny that any of their actings, doings or pretenses are contrary to equity or good conscience, or that they tend to the wrong, injury or oppression of said compl-inants in the premises.

Respondents answering would say unto your honor that on or about the 7th day of February, 1865, Maria Antonia Cano, Teresa Cano and her husband Antonio Sandoval, Ignacia Cano and Jose Maria Cano, the persons by whom and through whom all of the complainants in this action pretend to claim and derive their title to the premises in controversy, either as heirs or by purchase, filed their bill in equity in the district court of the first judicial
58 district of the Territory of New Mexico, sitting within and for the county of Santa Fé, against the said New Mexico Mining Company, John Greiner and Maraquita Montoya, the persons from and through whom these respondents claim title, claiming the identical premises now in controversy, and upon the same grounds stated and set forth in complainants' bill of complaint.

That after the filing of the said bill as aforesaid, the defendants therein appeared and filed their answers to the same, issues were joined upon the facts, and a large amount of testimony was taken, and afterwards, said bill was by the said court dismissed, and, a final decree rendered in favor of the defendants in said action and against the complainants therein, under and through whom these claimants claim (a full, true and perfect copy of which said bill, answers and all papers filed therein, together with all the testimony taken in said cause, and the decree and orders entered in said cause

are herewith filed, marked Exhibit "B," and made a part of this answers.)

Wherefore these respondents claim and allege that the matters in controversy in this suit having been fully and finally adjudged and passed upon *res adjudicata* and that these complainants are estopped from further prosecuting their said pretended claim by means of the proceedings, orders and decree so entered as aforesaid.

And for a further answer to said complainants' bill of complaint these respondents allege that the said complainants are estopped from in any manner prosecuting their said cause of action against these respondents, or from setting up any title or pretended title to the premises in controversy, or to any interest therein, because they say that said complainants and those under whom they claim have for more than twenty years had full knowledge that these respondents, and those under whom they claim, have
59 set up and claimed to be the owners in fee-simple of the entire tract of land in controversy and all of the mines situated therein, and that with said knowledge, complainants and those under whom they claim, have sat by and permitted the said respondents, and those under whom the- claim, to expend upon said property in developing and improving the same, more than two hundred thousand ($200,000.00) dollars and that they have sat by and with full knowledge of their pretended title, have permitted these respondents to invest more than four hundred thousand ($400,000.00) dollars in the purchase of these premises, without in any manner asserting their claim or informing these respondents that the same were in existence; so that said complainants, by reason of their said acts, are estopped from asserting any title or pretense of title to the premises at this date.

Further answering, these respondents say that neither the said complainants nor those under whom they claim, have been in possession of the said premises at any time since the transfer was made, as hereinbefore stated, by the said Ignacio Cano to the said Jose Franci-co Ortiz, and that neither these complainants nor those under whom they claim have at any time been in possession of the said premises or any part thereof for a period of more than ten (10) years next before the filing of their bill herein; and that these respondents, and those under whom they claim, have been in actual, open, notorious and adverse possession of the said premises, claiming title adversely to the said complainants to the entire tract of land in controversy for a period of more than ten (10) years next before the filing of complainants' said bill of complaint in this cause, and that said complainants and those under whom they claim had full knowledge of said adverse claim and adverse possession of these respondents and those under whom they claim.

60 Respondents beg leave to hereafter file with this answer a translation into English of the said original grant papers to Ignacio Cano and Jose Francisco Ortis of the said "Santa Rosalia mine" and said tract of land; also a translation of the said will of the said Jose Francisco Ortiz; also a copy of the deed of conveyance of Maraquita Montoya to John Greiner of the said mine and

tract of land; also a copy of the deed of conveyance of John Greiner to Abraham Rencher; also a copy of the deed of the association known as the "New Mexico Mining Company" to the corporation known as the "New Mexico Mining Company" by its trustees; also a copy of the patent of the United States to the New Mexico Mining Company for the tract of lands in question, and that the same may be filed and made a part of this answer and referred to as a part thereof.

All of which matters and things these respondents are ready to aver and prove as this court shall direct, and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

CATRON, THORNTON & CLANCY AND
BREEDEN & WALDO,
Solicitors for Respondents.

And afterwards, to wit, on the 26th day of June, 1884, the said defendant, Elias Brevoort, by his solicitor, filed in said clerk's office his answer to said bill of complaint, which is in the words and figures following to wit:

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

First Judicial District Court.

EDWARD T. FARISH *et al.*
vs.
THE NEW MEXICO MINING COMPANY *et al.* } Chancery.

61 The separate answer of Elias Breevort to the bill of complaint of Edward T. Farish, Benjamin M. Read, Larkin G. Read, Alexander Read, Modesto Ortiz, Teodora Ortiz de Martinez, and Transito Ortiz, complainants in the above-entitled cause.

This defendant now and at all times saving and reserving to himself all manner of benefit or advantage that may be taken to the many errors, uncertainties and imperfections in the complainants' bill of complaint contained, for answer thereto, or unto so much thereof as this defendant is advised is material or necessary for him to answer to, answers and says:

That he admits that in the year 1833, Jose Francisco Ortiz and Ignacio Cano (both deceased) registered in the office of Francisco Baca y Ortiz, a mineral vein of gold-bearing rock, and petitioned that the same be granted them; and also further petitioned for the privilege of water supplies and pasturage, all of which was duly granted them, at the time and in the manner and to the extent as stated in said bill of complaint.

And thereupon they, and their heirs and assigns, became vested with the ownership and all right, title and interest in and to the said mine and land adjacent thereto, and that under the laws of

Mexico, then in force, and the treaty of Guadalupe Hidalgo, they became entitled to a confirmation of said grant as stated in said bill of complaint. This defendant also admits that at the time said grant was originally made by the authorities of the Mexican government that Jose Francisco Ortiz and Ignacio Cano were tenants in common and each owner of an undivided one-half part of said grant, but denies that said Cano died possessed and seized of any portion of said grant, or that Ortiz, after such death, continued to hold possession of said mine and lands, connected therewith for the use of himself and all the heirs-at-law of said Ignacio Cano. And this defendant here states the fact to be, that previous to the death of said Cano, about the year 1834, the exact date of which
62 this defendant is at present unable to state, said Cano for a good, valid and sufficient consideration, sold, transferred and conveyed to said Jose Francisco Ortiz all his right, title and interest in and to the said mine, lands and grant, and every part thereof, formally delivering possession thereof in person, as was the universal custom then in vogue in New Mexico; and that said Jose Francisco Ortiz then entered into the exclusive possession of said mine, land and grant, worked, used, occupied and enjoyed the same until the time of his death in the year 1848; that since that time the heirs of said Jose Francisco Ortiz and this defendant and his trustees, and parties for his use and benefit, have been in the whole, entire and exclusive possession of said mine, land and grant.

This defendant is not advised as to whether said Ignacio Cano left any children or heirs-at-law, or whether he died intestate, or whether the parties named in said bill were or are his children and were married in the manner and in the time stated in said bill of complaint, hence this defendant neither admits nor denies the statements in said bill of complaint with reference thereto.

This defendant further shows that in the year 1848, the said Jose Francisco Ortiz died intestate in the said county and Territory, and leaving no direct heirs or heir, either ascendant or descendant, and that his only heirs-at-law, him surviving, was an only sister named Maria de la Luz Ortiz and the children of his only brother, Ignacio Ortiz, then deceased.

And this defendant further shows that said Ignacio Ortiz, brother of said Francisco Ortiz, died intestate prior to the death of the said Jose Francisco Ortiz, but in what year this defendant is not informed and therefore cannot state, and that the said Ignacio Ortiz left
63 him surviving as his own heirs-at-law, six children, namely, Abram, Estafana, Ramona, Esmerijilda, Prudencia and Macedonia, and that all of the above-named heirs of the said Jose Francisco Ortiz, children of his said brother Ignacio, excepting the said Abram Ortiz, long before the filing of said bill of complaint, by divers deeds of conveyance by them respectively duly made, executed, acknowledged and delivered to this defendant, for valuable considerations from him to them moving, duly granted, bargained, sold and conveyed to this defendant and his heirs, all their several estates, rights, titles, interests and claims in and to the said mine of Santa Rosalia and the said privileges, premises and lands so afore-

said granted in connection therewith, in virtue of descent from the said Ignacio Ortiz, as aforesaid:

And your defendant further shows that the said Maria de la Luz Ortiz intermarried with one Manuel Sanchez, and thereafter, to wit: in the year 1860 died intestate, leaving her surv-ing as her only heirs-at-law, five children of her said marriage, namely: Esmerejildo, Domingo, Ignacio, Herenio and Rosina; that the said Rosina intermarried with one Rafael Romero, and she and her said husband thereafter died intestate, but at what particular time your defendant is not informed and cannot state, leaving as the only issue of the said marriage and as the only heir-at-law of the said Rosina, an only daughter named Josefa Romero, who thereafter intermarried with one Jesus Garcia.

And your defendant further shows that all of the above-named heirs of the said Jose Francisco Ortiz, descendants of his said sister, Maria de la Luz, namely: the said Esmerejildo, Domingo, Ignacio, Herinio and Josefa, long before this action, by divers deeds of conveyance by them respectively duly made, executed, acknowl-
64 edged and delivered to your defendant, for valuable considerations from him to them moving, duly granted, bargained, sold and conveyed to your defendant and his heirs, all their -states, rights, titles, interests and claims in and to the said mine of Santa Rosalia and the said privileges, premises and lands so as aforesaid granted in connection therewith, in virtue of descent from the said Maria de la Luz, sister as aforesaid of the said Jose Francisco Ortiz.

And your defendant further shows that the terms and particulars of the said several conveyances to your defendant will more fully appear by reference to the said several deeds of conveyance so made and delivered to your defendant, which several deeds of conveyance your defendant craves leave to produce before your honor, and copies of which said several deeds last mentioned and filed with this answer as part thereof.

And your defendant further shows, on information and belief, that the said Abram Ortiz departed from the said Territory more than twenty years since, leaving behind him in said Territory his wife, but leaving no issue, and that the said Abram Ortiz has not been heard from for upwards of twenty years last past, and that prior to the execution and delivery of the said deeds last mentioned, he died intestate, without direct heirs, ascendant or descendant him surviving, long before the commencement of this action.

This defendant denies that said Jose Francisco Ortiz died intestate, leaving his widow all or any of his right, title and interest in and to said mine, land and grant, or that he made any will whatever in favor of his wife, and also denies that the estate of the heirs and legal representatives of Jose Francisco Ortiz is in manner limited to an undivided one-half of said grant and premises. This defend-
ant admits that in conformity with an act of Congress said
65 grant was duly investigated, considered and determined by the surveyor general of New Mexico as stated in said bill of complaint.

Defendant further admits that pursuant to the treaty of Guada-

Company, a corporation duly incorporated, organized and
68 established under the laws of said Territory, Stephen B. Elkins, resident of the State of New York, Jerome B. Chaffee, resident of the State of Colorado, Lars Anderson, resident of the State of Ohio, L. M. Lawson, whose first name is to your orator unknown, resident of the city of New York, State of New York, Edward T. Farish, of St. Louis, State of Missouri, Benjamin M. Read, Larkin G. Read, Alexander Read, Modesto Ortiz, Teodora Ortiz de Martinez and Transito Ortiz, her husband, of the Territory of New Mexico, Nestor Sandoval, Marcus Ramirez of the State of Colorado, Luis Ortiz and Juan Ortiz of the Territory of New Mexico, complaining, shows unto your honor: That said Edward T. Farish, Benjamin M. Read, Larkin G. Read, Alexander Read, Modesto Ortiz, Teodora Ortiz de Martinez and Transito Ortiz, her husband, part of the defendants herein named, on or about the 29th of January, 1883, filed their bill of complaint in this honorable court, against your orator and the New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee, R. W. Donnell, Lars Anderson, Nestor Sandoval, Marcus Ramirez, Luis Ortiz and Juan Ortiz, thereby praying, among other things, the said defendants named in said bill of complaint, might, to the best of their knowledge, remembrance, information and belief, but not under oath, full, true direct and perfect answers to make to all and singular the matters in said bill of complaint contained, and that it might be declared by the court that said complainants are entitled to the undivided interests in the lands and patent set forth in said bill of complaint and hereinafter fully described, and that they be left in the possession and enjoyment of said interests, and that such of the defendants therein
named as might be found clothed with the legal title to said
69 lands, be declared and decreed to be trustees for said complainants to the extent of their equitable rights and interests, and be required to execute good and sufficient deeds, with proper warranties to said complainants *coming* to them all their said rights and interests, and also to account to them for their proper share of all the rents, issues and profits derived by the defendants, or either of them, from said lands, and further, if it should be made to appear to your honor that either of the said defendants had conveyed or incumbered said lands, or any part thereof, or any interest therein, in such manner that it could not be recovered or reclaimed, that such defendant might be decreed to account to said complainants therefor and pay to said complainants the full value of such property, rights or interests lost to them by reason of such a conveyance or incumbrance; they also prayed for general relief and sub-œna returnable at the next term of this honorable court.

And your orators being served with process appeared and put in answer thereto, as by said bill and other pleadings and proceedings in said cause now remaining filed as of record in this honorable court, reference thereto being had will more fully appear.

Whereupon your orator complains and shows unto your honor that prior to the acquisition of New Mexico by the United States

and prior to the making of the treaty of Guadalupe Hidalgo by and between the United States and the Republic of New Mexico, Jose Francisco Ortiz and Ignacio Cano, two citizens of the Republic of Mexico, — certain mining lands, privileges and premises, situate in the department or Territory of New Mexico, and now being within the limits of the county of Santa Fé, in the present Territory of New Mexico, and known and designated as "the Ortiz Mine grant,"

70 the same consisting of a certain gold mine formerly known as the mine of Santa Rosalia, and now known as the "Ortiz mine," together with four square leagues of land, including the said mine; the said four square leagues being bounded on the north by a line drawn one league due east and one league due west from a point distant one league due north from the center of the orifice of the said mine; on the south by a line drawn one league due east and one league due west from a point distant one league due south from the center of the said orifice; on the east by a line drawn one league due north and one league due south from a point distant one league due east from the center of said orifice; and on the west by a line drawn one league due north and one league due south from a point distant one league due west from the center of the said orifice.

And your orator further shows that after the acquisition aforesaid of the said mining land and premises and prior to the inception of the hostilities between the United States and the Republic of Mexico, which resulted in the cession of New Mexico to the United States, but at what particular time your orator is unable to state, the said Ignacio Cano transferred and conveyed all and singular his right, estate, title, interest and claim of, in and to the said mining land and premises to the said Jose Francisco Ortiz, for a valuable consideration, and thereupon put the said Jose Francisco Ortiz into actual, exclusive possession of all and singular, the said mining land and premises; whereupon the said Jose Francisco Ortiz became and was the actual, sole and exclusive owner and possessor of the same and so continued to be up to and at the time of his death, claiming the same solely and exclusively and in his own right.

And your orator further shows that in the year 1848, at the city and county of Santa Fé, in the Territory of New Mexico,

71 the said Jose Francisco Ortiz died intestate, seized and possessed of all and singular the said mining land and premises, leaving him surviving his widow, but leaving no direct heir either descendant or ascendant.

And your orator further shows that the said Jose Francisco Ortiz, at the time of his death, left him surviving as his only heirs-at-law, an only sister named Maria de la Luz Ortiz, and the children of his only brother, Ignacio Ortiz, then deceased.

And you- orator further shows that the said Ignacio Ortiz, brother of the said Jose Francisco Ortiz, died intestate, prior to the death of the said Jose Francisco Ortiz, but in what year or at what place your orator is not informed, and therefore cannot state; and that the said Ignacio Ortiz left him surviving as his only heirs-at-law, his six children, born in lawful wedlock, namely, Abram, Estefana,

Ramona, Esmerejilda, Prudencia and Macedonia; and that all of the above-named heirs of the said Jose Francisco Ortiz, children of his said brother Ignacio, excepting the said Abram Ortiz, long before the commencement of this suit, by divers deeds of conveyance by them respectively, duly made, executed and acknowledged and delivered to your orator for valuable considerations from him to them respectively, moving, duly bargained, granted, sold and conveyed to your orator to the use of your orator, his heirs and assigns, all their several estates, rights, titles and interests and claims of, in and to all and singular the said mining land and premises, which had to them descended as heirs-at-law of the said Jose Francisco Ortiz or otherwise.

And your orator further shows that the said Maria de la Luz Ortiz intermarried with one Manuel Sanchez, and thereafter, to wit: in the year 1860, died intestate, leaving her surviving as her
72 only heirs-at-law, five children of her said marriage, namely: Esmerejildo, Domingo, Ignacio, Herenio and Rosaria; that the said Rosaria intermarried with one Rafael Romero and she and her husband thereafter died intestate, but at what particular time your orator is not informed and cannot state, leaving as the only issue of the said marriage and as the only heir-at-law of the said Rosaria, her surviving, an only daughter named Josefa Romero, who thereafter intermarried with one Jesus Garcia.

And your orator further shows that all of the said descendants of the said Maria de la Luz, sister of the said Jose Francisco Ortiz, namely: the said Esmerejildo, Domingo, Ignacio, Herenio and Josefa, long before the commencement of this suit, by divers deeds of conveyance by them respectively, duly made, executed, acknowledged and delivered to your orator for valuable considerations from him to them respectively moving, duly granted, bargained, sold and conveyed to your orator to the use of your orator, his heirs and assigns, all their estates, rights, titles and interests and claims of, in and to all and singular the said mining land and premises, which had descended from the said Jose Francisco Ortiz to the said Maria de la Luz and through her to them, the grantors last aforesaid.

And your orator further shows that the terms and particulars of the said several conveyances to your orator, will more fully appear by reference to the said several deeds of conveyance so made and delivered to your orator, which said several deeds of conveyance your orator prays leave to produce before your honor, and copies of which several deeds last mentioned are filed with this bill of complaint as part thereof.

And your orator further shows, upon his information and belief, that the said Abram Ortiz departed from the Territory of
73 New Mexico upwards of 20 years ago, leaving behind him in the said Territory his wife, whose name or particular place or residence is unknown to your orator, but leaving no issue or other direct heir, and that the said Abram Ortiz has not been heard from for upwards of 20 years last past, and that prior to the execution and delivery of the said deeds last mentioned, he died intestate

without direct heirs, ascendant or descendant him surviving, long before the commencement of this suit.

And your orator further shows that pursuant to and in conformity with a certain act of Congress of the United States of America, approved on the 22d day of July, in the year 1854, entitled an "Act to establish the offices of surveyor general of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes," the United States surveyor general in and for the Territory of New Mexico, investigated the matter of the aforesaid grant of the said mining land and premises, and examined, considered and determined upon the fact and validity of the said grant, and thereupon, to wit: on the 24th day of November, in the year 1866, he duly made his report pursuant to the said act, which report bears date on the said day last mentioned, and therein and thereby he decided and determined the said grant to be authentic and valid, and recommended the same to Congress aforesaid for confirmation, pursuant to the said treaty of Guadalupe Hidalgo.

And your orator further shows that after the making of the said report by the said surveyor general, Congress aforesaid, pursuant to the said treaty of Guadalupe Hidalgo, and out of regard for the obligations thereof and for the benefit and advantage of the heirs and assigns of the said original grantees, Jose Francisco Ortiz and
74 Ignacio Cano, passed a certain other act, approved on the 1st day of March, in the year 1860, entitled an "Act to confirm a certain private land claim in the Territory of New Mexico," wherein and whereby the grant aforesaid and the said report thereon were recited, and the said grant was referred to as private land claim No. 43, and wherein and whereby the said grant or private land claim was confirmed, and wherein and whereby it was expressly declared that the said confirmation should only be construed as a quitclaim or relinquishment on the part of the United States, and should not affect the adverse rights of any other person or persons whomsoever.

And your orator further shows that pursuant to the statute in such case made and provided, and to the course and practice of the General Land Office of the United States aforesaid, the said United States surveyor general in and for said Territory, caused the said land and premises, to wit: the four square leagues aforesaid, to be surveyed and laid out by metes and bounds and landmarks, and a map or plat thereof to be made, and thereupon he duly made a return of the said survey and the field-notes and data thereof, and of the said map or plat to the Commissioner of the said General Land Office, and filed the same in the said General Land Office, and that thereafter, to wit: in the year 1875, the said commissioners, duly approved the said survey, except as to the part hereinafter mentioned.

And your orator further shows, that according to the said return, field-notes, survey and map or plat, the said land and premises, which is all situate in the county of Santa Fé, in the said Territory of New Mexico, contains in superficial extent sixty-nine thousand acres of land.

And your orator further shows, that after the passage and promulgation of the said act of confirmation and after the
75 making and approving of the said survey, and after examination by the Secretary of the Interior of the United States aforesaid, of a certain conflict hereinafter described, existing between the said survey and that of a certain other Mexican land grant known as the Cañon del Agua grant, the said defendant, The New Mexico Mining Company, at and prior to the date of the letters patent hereinafter mentioned (as issued in its name as patentee,) wrongfully, falsely and fraudulently declared and represented to the United States aforesaid, and to the Commissioner of the said General Land Office and to the Secretary of the Interior of the United States aforesaid, and to Ulysses S. Grant, then the President of the United States aforesaid, that the said defendant, The New Mexico Mining Company, had duly acquired, by purchase from the legal representatives and assigns of the said Jose Francisco Ortiz, who died seized and possessed as aforesaid, of, in and to the said land and premises hereinbefore first mentioned, and that therefore as the legal assigns of the said original grantees, the said defendant, The New Mexico Mining Company, came within the scope and intent of the said act of confirmation and of the grant therein contained, and was entitled to be recognized by the United States aforesaid, and all the lawful authorities thereof, as the sole and only assign of the said original grantees and as the sole lawful claimant for the said grant of land, and as entitled to letters patent therefor from the United States aforesaid; and thereupon upon the false and fraudulent declarations, representations and suggestions, the said defendant, The New Mexico Mining Company, applied to the Commissioner of the said General Land Office and to the President of the United States aforesaid, for letters patent to be issued to the said defendant, The New
76 Mexico Mining Company, in its name for all and singular the said first-mentioned land and premises, to wit: the said four square leagues.

And your orator further shows that notwithstanding the said grant (to the said Jose Francisco Ortiz and Ignacio Cano) and the said survey and act of confirmation, the United States aforesaid, by its lawful authorities, had at the time of such application already issued to one Jose Serafin Ramirez, letters patent for a large tract of land known as the Cañon del Agua grant, which, as described in the letters patent last mentioned, embraced a certain piece or parcel of land, to wit: two hundred and fifty-nine acres or thereabouts, of the same land and premises, which had been surveyed as aforesaid as the land and premises granted as aforesaid to the said Jose Francisco Ortiz and Ignacio Cano; which said piece or parcel of 259 acres, or thereabouts, can be easily ascertained and definitely separated by inspection and comparison of the respective surveys and description of the said two several grants; and that such proceedings were had in the said General Land Office, before the Commissioners thereof, and afterwards by appeal to and before the said Secretary of the Interior, to all which proceedings the said defendant, The New Mexico Mining Company was a party, that upon the said ex-

amination of the said conflict of surveys, the said Secretary decided and determined that the said piece or parcel of land, to wit: the said 269 acres, or thereabouts, should be deducted from the said first-mentioned survey and allowed to the owners of the said Cañon del Agua grant. And your orator further shows that all and singular the aforesaid declarations, representations and suggestions of the said defendant, The New Mexico Mining Company, were untrue, false and fraudulent and were then and there known to the said defendant, The New Mexico Mining Company, and yet that induced
77 and misled thereby and believing the same to be true and with the intent to issue letters patent for the said first-described land and premises (except the piece or parcel aforesaid of about 259 acres) to the legal representatives and assigns of the said original grantees, (and not otherwise) the said Ulysses S. Grant, acting as President of the United States of America, issued and delivered, in the name of the United States aforesaid, to the said defendant, The New Mexico Mining Company, certain letters patent under the seal of the General Land Office aforesaid, and under his official hand, and bearing date of the 20th day of May, in the year of our Lord 1876, and of the Independence of the United States the 100th, and countersigned by the recorder of the General Land Office; wherein and whereby the said examination, report and survey of the said surveyor general respecting the said Mexican grant to the said Jose Francisco Ortiz and Ignacio Cano, and the said act confirming the same, and the said conflict of description respecting the said piece or parcel of 259 acres, or thereabouts, were each and all recited, among other things; and wherein and whereby the said United States of America gave and granted unto the said defendant, The New Mexico Mining Company, and to its successors and assigns, all and singular the said first above described land and premises, containing 69,458.33 acres, but excepting and reserving from the transfer, by such letters patent, so much of the land embraced in the said hereinbefore first-mentioned land and premises as is included in the survey of the said Cañon del Agua grant, approved by the surveyor general of the Territory of New Mexico, on the 16th day of October in the year 1866, and patented to Jose Serafin Ramirez, his heirs and assigns, on the 1st day of July, in the year 1875, and estimated to contain about 259 acres as aforesaid; and with the further express stipulation that in virtue of the said
78 act of Congress, approved the first day of March, in the year 1861, the confirmation of the said claim and the said patent, that is to say, the said Mexican grant to the said Jose Francisco Ortiz and Ignacio Cano, and the said patent therefor should only be construed a quitclaim or relinquishment on the part of the United States aforesaid, and should not affect the adverse rights of any other person or persons whomsoever: to have and to hold the said land and premises, with the appurtenances, unto the said defendant, The New Mexico Mining Company, and to its successors and assigns forever, with the exception, reservation and stipulation aforesaid.

And your orator further shows that thereafter, by virtue and under color of said letters patent, the said defendant, The New Mexico

Mining Company, entered upon, occupied, possessed and enjoyed the said land and premises described in and granted by the said letters parent as patentee thereunder, and remained and continued in the same occupation, possession and enjoyment under color and claim of the said letters patent, until the conveyance to the said defendants, Stephen B. Elkins and Jerome B. Chaffee, hereinafter mentioned.

And your orator further shows upon his information and belief that at the time of the issuing of the said letters patent to the said defendant, The New Mexico Mining Company, as aforesaid, your orator was the only legal representative and assign of the Jose Francisco Ortiz and Ignacio Cano and of the said Mexican grant, so made to them as aforesaid, and that he was so by force and virtue of the several deeds of conveyance so made to him, your orator, as hereinbefore set forth; and your orator was therefore the only person to whom the said last-mentioned Mexican grant (to wit: the "Ortiz Mine grant,") and the said land and premises included
79 therein were intended to be confirmed, assured and granted by the said last-mentioned act of Congress aforesaid and was the only person at the date and issuing of the said letters patent, entitled to receive and enjoy the same and the estate and property thereby intended to be granted and conferred.

And your orator further shows that in all and singular the proceedings had by and before the said surveyor general touching the investigation, examination, consideration and determination of the said Mexican grant and the private land claim thereunder, the said defendant, The New Mexican Mining Company, appeared and falsely and fraudulently represented itself to be the only assign and representative of the said original grantees, Jose Francisco Ortiz and Ignacio Cano, of the said Mexican grant; and your orator further shows that it was only by force and by reason of such false and fraudulent representations that the said defendant, The New Mexico Mining Company was ever recognized by the said surveyor general as such assign or representative.

And your orator further shows that while the said proceedings were pending before the said surveyor general, preliminary to the said report and act of confirmation, the said defendant, The New Mexico Mining Company, recognizing the authenticity and validity of the said Mexican grant, and not claiming adversely thereto, but pretending falsely and fraudulently to be the only assign and representative of the said original grantees, and of the said grant, and claiming only as such assign and representative, entered upon and occupied certain part of the said granted premises.

But your orator further shows unto your honor that in all
80 its said acts and doings, claims and representations before the said surveyor general, as well in so entering upon and occupying certain parts of the said granted premises, the said defendant, The New Mexico Mining Company, was in no manner or degree beneficially interested, or entitled in or to the said lands or premises or any part thereof, and it was and it always thereafter remained merely a trustee by its own wrong and fraud aforesaid for

the use and benefit of its lawful heirs and representatives aforesaid of the — Jose Francisco Ortiz.

And your orator further shows that by reason of the facts above set forth, the said defendant, The New Mexico Mining Company, received the said letters patent and occupied, possessed and enjoyed the estate and property therein described and granted, only in trust for and to the use and benefit of your orator, and that the said defendant, The New Mexico Mining Company, never acquired or possessed or was entitled to any beneficial right, use, property, estate or interest whatever in the said letters patent, or thereunder, or in the lands and property thereby granted.

And your orator further shows that thereafter (to wit: on the — day of January, in the year 18—,) the said defendant, The New Mexico Mining Company, by a certain deed of conveyance by it executed under its corporate seal and acknowledged and delivered to the said defendants, Stephen B. Elkins and Jerome B. Chaffee, purported and pretended to convey all and singular the said land and premises, so to it patented as aforesaid to the said defendants, Stephen B. Elkins and Jerome B. Chaffee; and that thereafter, as your orator is informed and believes, but at what particular time or by what particular instrument or other means, your orator
81 is not informed, and therefore cannot state, the said defendants Stephen B. Elkins and Jerome B. Chaffee purported or pretended to convey to the said defendant, Lars Anderson and to divers other persons to your orator unknown, some share or estate, right, title, interest or claim of, in or to the said land and premises; but your orator is not informed, and he has no means of ascertaining, and therefore he cannot state at what particular time or in what particular manner, or in what shares or quantities, or in what estates or tenancies, such conveyance or conveyances by the said Stephen B. Elkins and Jerome B. Chaffee, or either of them were made; and your orator therefore cannot state particularly concerning the same.

And your orator further shows that upon receiving the said letters patent and claiming and occupying the said land and premises thereunder, it became and was the duty of the said defendant, The New Mexico Mining Company, as trustee aforesaid of your orator, not only to protect the said estate from waste or injury, but also to protect the same against injurious and illegal clouds upon the title thereof; but your orator further shows that the said defendant company, unmindful of its duties in the premises, permitted the said defendants, Stephen B. Elkins and others claiming title, to a certain other land grant or private land claim known and officially designated as the "Mesita de Juana Lopez," the same being a grant of lands situated wholly north of the Galisteo river in the said county of Santa Fé, to procure to be made falsely and fraudulently a survey of the said last-mentioned land grant by the surveyor general of the said Territory, by which the lands embraced in the said last-mentioned land grant are made to appear to extend upon and over the northwest part of the said Ortiz Mine grant, so as to encroach

upon and embrace 20,000 acres more or less of the said
82 Ortiz Mine grant, and the land and premises part of the said 4 square leagues; and also falsely and fraudulently and by means of falsely representing to the said surveyor general and the said Commissioner of the General Land Office, that the said false and fraudulent survey was true and correct, and that the said land grant, the Mesita de Juana Lopez included the said area of 20,000 acres, more or less, of the said Ortiz Mine grant, procured the said false and fraudulent survey of the said land grant, the Mesita de Juana Lopez to be approved by the said surveyor general and Commissioner.

And your orator further shows that the said land grant, the "Mesita de Juana Lopez" is a valid Spanish grant, made by the Kingdom of Spain, long prior to the making of the said Ortiz Mine grant, and the said Spanish grant has been duly confirmed by the act of Congress of the United States; wherefore and by means of the premises, the said survey of the said Spanish land grant is the same, being valid on its face, and without proof of the said false representations and false and fraudulent survey, a cloud on the title of the said Ortiz Mine grant.

And your orator further shows that the said defendant, The New Mexico Mining Company, before it accepted the said letters patent and the said other defendants, before they or either of them accepted any conveyance or instrument or transfer of or concerning the said Ortiz Mine grant, or any of the land or premises embraced therein, had full notice of the said rights by inheritance of the said heirs-at-law of the said Jose Francisco Ortiz, in and to the same and of the said several conveyances to your orator, vesting in him the sole equitable title in and to the said Ortiz Mine grant, and the said land and premises, and of the said wrong and fraud and of the said trust.

83 And your orator further shows that the said defendant, The New Mexico Mining Company, has yielded the said occupation and possession of the said land and premises so heretofore enjoyed by it under the said letters patent to the said defendants, Stephen B. Elkins and Jerome B. Chaffee, and they, the said two defendants last named, in their own behalf and in behalf of the said defendant, Lars Anderson, and others unknown to your orator, their associates are now in the occupation, possession and enjoyment of the said Ortiz Mine grant, except so much thereof as is included in the said false and fraudulent survey of the said The Mesita de Juan Lopez land grant, and as to the part last mentioned said defendant, Stephen B. Elkins, is in participation with Thomas B. Catron and others to your orators unknown, claimants of the said Mesita de Juana Lopez grant in occupation, possession and enjoyment of the same; and the said defendants, according to their respective possessions aforesaid, are, and for several years last past have been in receipt of all the rents, issues and profits of the premises by them so respectively possessed, appropriating the same to their own use to the exclusion of your orator and without his consent, and against his protest and objection.

And your orator further shows that the said land and premises embraced within the said four square leagues contain much valuable growing timber and also many valuable mines and mineral beds of gold, silver, copper, lead and coal, and that the same are of great value, to wit: of the value of five million of dollars and upwards, and that the said defendants Stephen B. Elkins Jerome B. Chaffee and Lars Anderson and their associates and confederates, to your orator unknown, are making preparations to cut and appropriate the said timber and to open and operate the said
84 mines and mineral beds and to convert the mineral and other products of the said land and premises to their own use, and they threaten to commit waste on the said land and premises and to convert the said timber and the said mineral and other products thereof to their own use without the consent and against the protest and objection of your orator. And your orator further shows that the said defendants, except the defendant company, threaten to sell and convey the said land and premises and to convert the purchase-money to their own use.

And your orator further shows that the said tract of 20,000 acres, more or less, affected by the said false and fraudulent extension of the survey of the said Mesita Juana Lopez land grant, embraces the most valuable coal lands of the said Ortiz Mine grant, and that the said tract so affected contains inexhaustible and extremely valuable beds of both anthracite and bituminous coal.

And your orator further shows that the said defendants, Edward T. Farish, Benjamin M. Read, Larkin G. Read, Alexander Read, Modesto Ortiz, Teodora Ortiz de Martinez, and Transito Ortiz, her husband, claiming to be heirs and assigns of the said Ignacio Cano, ignore the said conveyance so made as aforesaid by the said Ignacio Cano in his lifetime (he being now deceased) to the said Jose Francisco Ortiz of all the estate, right, title, interest and claim of the said Ignacio Cano, as original grantee as aforesaid, in and to the said Ortiz Mine grant and the said land and premises embraced therein, and now unlawfully set up and pretended that the said Ignacio Cano never at any time made such conveyance and never at any time transferred his interest in the said Ortiz Mine grant, land and premises to the said Jose Francisco Ortiz, and further unlawfully set up and pretend that as to one undivided half
85 part of the lands and premises your orator is not beneficially or otherwise the owner thereof.

And your orator hoped that the said defendants, The New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee and Lars Anderson, and their own associates having notice and knowledge as aforesaid of the said trust so existing as aforesaid in your orator's behalf, and of your orator's equitable right to the said letters patent so as aforesaid issued to the said defendant, The New Mexico Mining Company, and to the said land and premises therein described and ther-by granted, would before this have recognized and acknowledged your orator's rights in the premises and yielded to him the possession and enjoyment of the said last-mentioned land and premises and delivered and surrendered to him the said letters

patent, and by proper deed of conveyance assured to him the full legal and equitable title to the said land and premises; and also that the said other defendants, pretended heirs and assigns of the said Ignacio Cano, would have recognized your orator's said right in the premises, and relinquished their said adverse claims and premises as in justice and equity the said defendants respectively ought long since to have done.

But now so it is, may it please your honor, that the said defendants combining and confederating together, and with divers persons at present unknown to your orator, whose names, when discovered, your orator prays he may be at liberty to insert therein, with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orator in the premises, they the said defendants, absolutely refuse to do equity to your orator in the premises or to comply with his repeated requests in that behalf, and they at
86 times pretend that your orator is not the assign of all the estate, right, title, interest and claim whereof *of* the said Jose Francisco Ortiz died seized and possessed of, in and to the said Ortiz Mine grant and the said land and premises embraced therein, and they, except the said pretended heirs and assigns of the said Ignacio Cano, at times pretend that one Mariquita Montoya, now deceased, the widow of the said Jose Francisco Ortiz, deceased, inherited the said grant, land and premises from the said Jose Francisco Ortiz, deceased, and thereafter she conveyed the same to one John Greiner, and that thereafter the said John Greiner conveyed the same to Abraham Rencher, Elisha Whittelsey, Ferdinand W. Risque, Andrew J. O'Bannon, C. E. Sherman, N. M. Miller and Thomas J. Walker, and that thereafter the said last-named persons conveyed the same to the said defendant, The New Mexico Mining Company, prior to the alleged conveyance thereof by the said defendant, Stephen B. Elkins, and Jerome B. Chaffe, as aforesaid; and at times the said defendants (except the said pretended heirs and assigns of the said Ignacio Cano) pretend that before the said alleged conveyance by the said Mariquita Montoya, she has acquired the said Ortiz Mine grant, land and premises by means of a pretended will or testamentary writing or other instrument alleged to have been executed by the said Jose Francisco Ortiz, in his lifetime, and they (except as aforesaid) at times pretended that the said act of confirmation and the said letters patent were not intended for the benefit of the legal representatives and assigns of the said original grantees of the said grant, land and premises last aforesaid, but that the same were intended for the use and benefit of the said defendant The New Mexico Mining Company and its assigns, and
87 they (except as aforesaid) also at times pretend that the said last-mentioned assigns are lawful and equitable holders and owners of the said timber, and that the said mineral and other products and of all the rents, issues and profits of the said last-mentioned land and premises, and as such are entitled to appropriate and enjoy the same to their own use and benefit and to the total exclusion of your orator therefrom, and they, the said other defendants, pretended heirs and assigns of the said Ignacio

Cano, also pretend that they are equitably and beneficially entitled to the said Ortiz Mine grant, land and premises and to the said letters patent to the extent of one undivided half part, share or interest therein; to the exclusion of your orator from such one undivided half part.

Whereas your orator charges the contrary thereof to be truth and that he is the only legal representative and assign of the said original grantees, Jose Francisco Ortiz and Ignacio Cano respecting the said Mexican grant so made to them and as such is entitled to the exclusive benefit and advantage of the said act of confirmation and letters patent last mentioned.

All of which actings, doings and pretenses of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises. In tender consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rule of the common law and is relievable only in a court of equity, where matters of this nature are properly cognizable and relievable.

To the end therefore that the said defendants and their confederates, when discovered, may (without oath, an answer under oath being hereby expressly waived) to the best and utmost of their respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the mat-
88 ters aforesaid, and that as fully and particularly as if the same were here repeated and they and every one of them distinctly interrogated thereto; and that to save and protect the said Ortiz Mine grant and the said land and premises embraced therein, and the said letters patent therefor, and the timber growing thereon, and the mines and mineral beds of gold and coal and other metals and minerals therein contained, and to prevent loss and waste thereon pending this action, and to bring and prosecute proper actions at law and suits in equity in the premises, and especially to bring and prosecute a suit in equity to remove from the title of the said Ortiz Mine grant, with the said land and premises embraced therein, the said cloud created and existing by reason of the said false and fraudulent extension of the said *false and fraudulent extension of the said* survey of the said "Mesita de Juana Lopez" land grant, one or more receivers may be appointed by your honor, of all and singular the said Ortiz Mine grant, and the said land and premises embraced therein, with the appurtenances and of the said letters patent therefor, and that the said defendants, and each and all of them, may be compelled by the order of this honorable court forthwith to deliver actual possession and custody of the said last-mentioned land and premises and letters patent to the said receiver or receivers, and that the said defendants, and each and all of them, be restrained by the order and injunction of this honorable court from cutting down any timber or other trees on the said last-mentioned land and premises, and from opening or operating any mines thereon, and from raising, producing or removing any gold, silver, copper, lead, iron, coal or other

ore, metal or mineral therefrom, and from committing any
89 other waste thereon, and from collecting, receiving or appropriating any of the rents, issues, profits or income of the said property last mentioned, and from actively or passively granting, bargaining, selling, assigning, transferring, mortgaging, incumbering, beclouding, injuring or intermeddling with the said last-described property or any part thereof, and from defacing, injuring, concealing, endangering or transferring or otherwise despoiling or interfering with the said letters patent so as aforesaid issued to the said defendant, The New Mexico Mining Company; and that the said defendants may fully answer the premises, and that it may be declared and decreed by the honorable court that your orator is lawfully entitled in his own right to all and singular the said Ortiz Mine grant, land and premises, to wit: the said 69,458.33 acres of land, subject to the exception, reservation and stipulation sustained in the said letters patent, issued to the New Mexico Mining Company, bearing date the 20th day of May, in the year 1876; and further, that your orator is entitled to the possession of the said letters patent and to the occupation, possession and enjoyment of the patented lands and premises therein described; and further, that the said defendant, The New Mexico Mining Company, received the said letters patent in trust for the sole use and benefit of your orator; and further, that the several conveyances of the said last-mentioned patented land and premises made by the defendants, The New Mexico Mining Company, and Stephen B. Elkins and Jerome B. Chaffee, and all other conveyances made by the defendants, or any or either of them, of the same land and premises last mentioned or any part thereof, were made subject to the trust aforesaid; and further, that none of
90 the defendants to this action have or has any benefit or equitable estate, right, title, interest or claim of, to or in upon the said land and premises last described or any part thereof, or the appurtenances thereof, or the timber, gold, silver, copper, lead, coal or other product thereof, or the rents, issues, profits or income thereof; and further, that none of the said defendants is a purchaser in good faith and without notice, of the said last-mentioned land and premises, or any part thereof, or any interest therein; and further, that the said defendants, The New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee and Lars Anderson and their associates and confederates and trustees, and each of them is a trustee of the said last-mentioned land and premises and of the title thereto to the use and for the benefit of your orator; and that by the decree of this honorable court, the said defendants and each of them may be compelled to surrender and deliver the said letters patent to your orator, and that they and each of them may be compelled to execute, acknowledge and deliver to your orator proper deeds of conveyance in due form of law to convey and release the said land and *and* premises last mentioned, with the appurtenances to your orator and in and by such deeds to covenant against the acts and sufferances of the said defendants respectively, in respect to the said premises, and to covenant for further assurance of the title

thereof to your orator and his heirs and assigns; and that your orator may have such further and other relief as to this honorable court shall seem just and equitable and proper in the premises; and that the said defendants may be required to pay the costs of this action and expenses of the said receivership; and that your orator may have the damages by him sustained by reason of the grievances aforesaid, to wit: one million of dollars; and that for the pur-
91 pose of ascertaining the said damages an accounting may be had by and between the several parties to this suit of and concerning their acts and doings in and *and* about the said last-described property; and that if by reason of any facts not known to your orator and not within his information and therefore not alleged in this bill, it shall appear to this honorable court that the said last-described property, land and premises or any part thereof have been or has been diverted from your orator in contravention of the said trust by the said defendants or any thereof, so that this court cannot administer equity in the premises, by compelling the actual conveyance thereof in possession to your orator and cannot afford adequate and complete relief to your orator in the premises, then, that as against the said defendant so offending, your orator may have judgment for his damages in that behalf suffered, whatever the same may to this honorable court be proved to be; and also, if no cause to the contrary sufficiently appear that by force and direction of the decree of this honorable court, your orator may be put into free, full and peaceable possession of all and singular the said land and premises last described, and of all mines and mineral beds and deposits therein contained and of all the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

May it please your honor to grant unto your orator the writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the said New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee, Lars Anderson, L. M. Lawson, Benjamin M. Read, Larkin G. Read, Alexander Read, Edward T. Farish, Modesto Ortiz, Teodora Ortiz de Martinez, Transito Ortiz, Nestor Sandoval, Marcus Ramirez, Luis Ortiz and Juan Ortiz,
92 thereby commanding them and each of them and their confederates under a certain penalty therein to be limited personally to appear before your honor in this honorable court on the 1st day of the next term thereof, to be held in and for the county of Santa Fé, and then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to, perform and abide such further order, direction and decree therein as to this honorable court shall seem agreeable to equity and good conscience; and your orator as in duty bound will ever pray, etc.

ELIAS BREVOORT, *Complainant.*
GILDERSLEEVE & KNAEBEL,
Solicitors for Compl'ts and of Counsel.

And, at a regular term of the district court of the first judicial district of the Territory of New Mexico begun and held within and

for the county of Santa Fé, at the court-house in the city of Santa Fé, on the first Monday of February, in the year one thousand eight hundred and eighty-six, for the trial of causes arising under the laws of said Territory, and on the second day of said term, the same being Tuesday, February 2, 1886, the following, among other proceedings were had, to wit:

ELIAS BREVOORT
vs.
THE NEW MEXICO MINING COMPANY *et al.* } 1865. Chancery.

Now come the said defendants, The New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee, Lars Anderson, by their solicitors, Messrs. Catron, Thornton and Clancy, and William Breeden, Esquire, and enter their appearance herein.

And afterwards, to wit: on the 22nd day of February, 1886, the said New Mexico Mining Company, by its solicitors, filed in the said clerk's office, its answer to said cross-bill of Elias Bre-
93 voort, which is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

In the District Court of the First Judicial District, February Term, 1886.

ELIAS BREVOORT
vs.
THE NEW MEXICO MINING COMPANY *et al.* }

Separate Demurrer and Answer of the New Mexico Mining Company.

This respondent, now and at all times hereafter saving and reserving all manner of benefit and advantage to itself of exception to the many errors and insufficiencies in said cross-bill contained, for answer thereto or unto so much or such parts thereof as this respondent is advised is material for it to make answer or demurrer, demurrers to so much of said cross-bill of the said complainant as is contained in the following extracts, to wit: Commencing at the 29th line of the 27th page thereof and ending with the 17th line of the 30th page, in words and figures as follows: "And your orator further shows that upon receiving the said letters patent and claiming and occupying the said land and premises thereunder, it became and was the duty of the said defendant, The New Mexico Mining Company as trustee aforesaid of your orator not only to protect the said estate from waste and injury but also to protect the same against the injurious and illegal clouds on the *table* thereof; but your orator further show- that the said defendant company unmindful of its duty in the premises permitted the said defendant, Stephen B. Elkins, and others claiming title to a certain other land grant or private claim known and officially designated as the 'Mesita de Juana

Lopez' the same being a grant of lands situated wholly north of the Galisteo river in the said county of Santa Fé, to procure to be
94 made falsely and fraudulently a survey of the last-mentioned land grant by the surveyor general of the said Territory by which the lands embraced in the said last-mentioned land grant are made to appear to extend upon and over the northwest part of the said Ortiz Mine grant so as to encroach upon and embrace twenty thousand acres more or less of the said Ortiz Mine grant and premises part of the said four square leagues, and also falsely and fraudulently and by means of falsely representing to said surveyor general and to the said Commissioner of the General Land Office that the said false and fraudulent survey was true and correct and that the said land grant the "Mesita de Juana Lopez" included the said area of twenty thousand acres more or less of the said Ortiz Mine grant, procured the said false and fraudulent survey of the said land grant the 'Mesita de Juana Lopez' *is* a valid Spanish grant made by the Kingdom of Spain long prior to the making of the said Ortiz Mine grant, and the said Spanish grant has been duly confirmed by act of the Congress of the United States, wherefore and by means of the said premises the said survey and the said Spanish land grant is (the same being valid on its face and without proof of the said false representations and fraudulent survey) a cloud on the said Ortiz Mine grant."

And as to so much of said cross-bill as in any manner refers to the "Mesita de Juana Lopez," this respondent doth demur*rer* and for cause — demurrer shows that the said plaintiff has not made or stated in such portions of said cross-bill such a case as entitles him in a court of equity to the relief prayed for or any part thereof, because the same is multifarious and is in nowise the subject-matter in litigation in the original bill of Edward T. Farish *et al.*, or of the real matter in issue in the cross-bill of said Elias Brevoort,
95 and would introduce new parties not in any manner connected with or interested in the other cause of complaint in said cross-bill, because the same is so indefinitely stated that it would be impossible for a decree to be rendered thereon, and this respondent for said reasons prays judgment of the court as to such parts of said cross-bill as it has demurr*ered* to as aforesaid.

And this respondent as to the residue of said cross-bill for answer thereto or to so much and such parts thereof as it is advised it is material or necessary for it to make answer unto, answers and says:

It admits that said Edward T. Farish, Benjamin N. Read, Larkin G. Read, Alexander Read, Modesto Ortiz, Teodora Ortiz de Martinez and Francisco Ortiz her husband, four of the defendants in said cross-bill named, did, on or about the 29th day of January 1883, file their bill of complaint in this honorable court against Elias Brevoort and the New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee, R. W. Donnell, Lurz Anderson, Nestor Sandoval, Marcus Ramirez, Louis Ortiz and Juan Ortiz, thereby claiming the matters and things set up in said cross-bill and alleged to have been prayed for, and especially claiming an undivided half

interest in the lands and patents set forth in said bill of complaint and afterwards referred to in said cross-bill, and that they be let into the possession and enjoyment of said interest, all of which will more particularly appear by reference to said cross-bill, reference thereto being hereby made for that purpose.

It admits that prior to the acquisition of New Mexico by the United States and prior to the making of the treaty of Guadalupe Hidalgo by and between the United States and the Republic of Mexico, Jose Francisco Ortiz and Ignacio Cano, two citizens of the Republic of Mexico had duly acquired by grant from the
96 said Republic of Mexico, certain mining lands, privileges and premises, situated in the department or Territory of New Mexico and now being within the limits of the county of Santa Fé in the present Territory of New Mexico and now known and designated as "the Ortiz Mine grant," the same consisting of a certain gold mine formerly known as the mine of Santa Rosalia and was known as the Ortiz mine, together with four square leagues of land including the said mine, the boundaries of which are more particularly described in said cross-bill; but this respondent denies that said grant was a perfect and complete grant so as to vest the legal title to said mine and premises in said grantees, or had any other force and effect than as is hereinafter stated in this answer.

Respondent alleges the truth to be in and about the execution of said grant to said Jose Francisco Ortiz and Ignacio Cano, that they registered in the office of Francisco Baca y Ortiz, the constitutional alcalde of Santa Fé on the 18th day of December 1833; that the said alcalde placed them in possession of said mine by virtue of the discovery thereof and in pursuance of a petition made by them, the said Jose Francisco Ortiz and Ignacio Cano, under and in pursuance of the mining laws of Mexico; that at the time that they so petitioned said alcalde for the possession of said mine, they prayed that said constitutional alcalde should provide for their said petition in accordance with the ordinance on mining; that the said constitutional alcalde only admitted the said petition of the said Ortiz and Cano and placed them in possession of said mine after having examined and taken proof in the premises as required by law; that after said possession was given by said constitutional alcalde, the said Ortiz and Cano represented to said alcalde that they were authorized to be invested with
97 necessary water supplies and issues for the working of machinery and for the pasturage of cattle, to be used in connection with the working of said mine of Santa Rosalia, and to that end petitioned the said alcalde for the same to be given them in possession, and that the said alcalde (so far as he was competent so to do) granted to the said Ortiz and Cano, for the said purposes, the land adjacent to said mine of Santa Rosalia, four leagues square, that is to say, two leagues each way to each cardinal point of the compass from the said mine, but without any detriment to third persons, and placed them in possession thereof (so far as he was able to do), for the purposes referred to; all of which facts will more fully appear by reference to a translated copy of the original papers

given by said Francisco Baca y Ortiz in the premises, which respondent prays leave to file hereafter, and that the same may be taken and considered as a part of this answer.

Respondent alleges, as it is advised, that the said acts and doings of the said Ortiz and Cano and the said alcalde in the premises did vest in the said Ortiz and Cano an inc*oh*ate title and equitable estate in said mine and lands for the purposes mentioned.

Respondent admits that said Cano granted, bargained, sold, released and conveyed to said Ortiz, as stated in said cross-bill, all of the estate, right, title and interest, which he, the said Cano, in any manner had in and to the said mine and said four leagues square of land, and it further states that it is not at present informed where the said deed of conveyance thereof can be found. It admits that after said conveyance by said Cano to said Ortiz, said Ortiz remained and continued in the sole and exclusive possession of the said mine and the said land, and in the terms and conditions of the possession given to him by said Baca y Ortiz as constitutional alcalde.

98 Respondent is not informed as to the exact date of the death of said Jose Francisco Ortiz, but is informed and believes that he died between the year eighteen hundred and forty-one and the year eighteen hundred and forty-six, but it denies that he died intestate. It admits that he left surviving his widow and that he left no direct heirs, ascend*a*nt or descend*a*nt, and it denies that his only heirs-at-law were Maria de la Luz Ortiz and the children of Ignacio Ortiz, deceased, *he* it states the fact to be that said Jose Francisco Ortiz, prior to the time of his death, to wit, on the fifteenth day of *of* August 1841, made and executed his last will and testament and which said will and testament was in full force and had not been revoked or annulled at the time of the death of said Jose Francisco Ortiz, but was and is a good and valid will and testament according to the laws and customs in force in New Mexico at the times of the date of said will and the death of the said Jose Francisco Ortiz; that under and by virtue of the terms of said will, the said Jose Francisco Ortiz made and constituted Maria Ynes Montoya, commonly called Maraquita Montoya, at that time his wife, as his sole and only heir to all of his property, which he held or possessed at the time of his death, of whatever class or description the same might be, a copy and translation of which said last will and testament marked "Q" is herewith filed and made a part of this answer; and respondent here states the fact to be that under and by virtue of said last will and testament, the said Maria Ynes Montoya became the owner and was possessed of all the right, title, estate and interest which the said Jose Francisco Ortiz, at the time of his decease, held and possessed either legally or equitably in and to the mine and land in question, and she thereupon took possession of the same claiming the same

99 under and by virtue of the terms of said last will and testament, and from the date of the decease of said Jose Francisco Ortiz to the present time she and her assigns have held possession of and claimed the said mine and lands in question by virtue of the

said will and testament and divers and sundry deeds of conveyance purporting to convey an estate in fee-simple in and — the mine and lands in question, and that no claim by suit, either in law or equity effectually persecuted prior to the filling of complainants' cross-bill, has ever been set up or made to the said mine, lands, tenements and hereditaments in question, and that the said Maria Ynes Montoya and her assigns have from the said Jose Francisco Ortiz hitherto held, occupied and possessed the said mine and land in question solely and exclusively, and so held, occupied and possessed the sole and exclusive possession of the mine and lands in question constantly, and without interruption in any manner whatever from any one, for a period of more than thirty years next proceeding the date of the filing of the said cross-bill, claiming the same as their own under color of title and otherwise, as before stated.

Respondent denies that the said Ignacio Ortiz was a brother of Jose Francisco Ortiz or that he died intestate, or that the said Ignacio left him surviving, as his only heirs-at-law, the six children named in said cross-bill or that he had any heirs-at-law whatever, and further denies that any of the said persons mentioned as children or heirs of the said Ignacio Ortiz, or said Ignacio Ortiz himself, ever at any time occupied, held or possessed any part or portion of the mine and land — question or have ever in any legal way claimed or pretended to claim any estate, right or title, in and to the mine and land in question or any part thereof, and it further denies that any of the said children or heirs
100 have, at any time, by any deed or deeds of conveyance, duly made, executed, acknowledged or delivered to complainant-, for any valuable considerations, duly granted, bargained, sold, or conveyed to the said complainant- or any one else any right, title, interest or claim in and to the said mine and the privileges, premises and lands, as stated in said cross-bill, and it states the fact to be that if any of said pretended children or heirs of said Ignacio Ortiz have ever made or pretended to make, execute and deliver any deed or deeds of conveyance to the whole or any part of the mine and lands in question, that such deeds were made without any due and lawful consideration and under an illegal and champertous bargain and contract, and at a time when neither of them had a right to make or execute any legal and valid deed of conveyance to the whole or any part of the mine or land in question, and, if any such deeds have been made and delivered to said complainant-, the same are wholly illegal and void and confer upon the said complainant- no right to maintain or claim any interest either legal or equitable, in and to the whole or any part of the land and mine in question.

Respondent further denies that either the said Ignacio Ortiz was brother, or that the said Maria de la Luz Ortiz was a sister of the said Jose Francisco Ortiz, or that the said Maria de la Luz Ortiz, intermarried with one Manuel Sanchez, or that she died intestate or left her surviving as her duly heirs-at-law the five children named in the said cross-bill, to wit, Esmerejildo Sanchez, Domingo Sanchez, Ignacio Sanchez, Herenio Sanchez, and Rosaria Sanchez; it

further denies that the Rosaria intermarried with one Rafael Romero, or that she or her said husband died intestate, or that they left an only child them surviving, named Josefa Romero, or
101 that said Josefa Romero was ever intermarried with one Jesus Garcia, or that the said Maria de la Luz Ortiz ever had any heirs-at-law whatever.

And respondent further denies that any of the said persons mentioned as children or heirs of the said Maria de la Luz Ortiz, or the said Maria de la Luz Ortiz herself, ever at any time, occupied, held or possessed any part or portion of the mine and land in question, or have ever in any legal way claimed or pretended to claim any estate, right or title in and to the mine and land in question, or any part thereof, and it further denies that any of the said children or heirs have at any time, by any deed or deeds of conveyance, duly made, executed, acknowledged or delivered to complainant-, for any valuable considerations, duly granted, bargained, sold or conveyed to the said complainant- or any one else, any right, title, interest or claim in and to the said mine and the privileges, premises and lands as stated in said cross-bill, and it states the fact to be that if any of said pretended children or heirs of said Maria de la Luz Ortiz have ever made or pretended to make, execute and deliver any deed or deeds of conveyance to the whole or any part of the mine and lands in question, that such deeds were made without any due and lawful consideration and under an illegal and champertous bargain and contract, and at a time when neither of them had a right to make or execute any legal and valid deed of conveyance to the whole or any part of the mine or land in question, and if any such deeds have been made and delivered to said complainant-, the same are wholly illegal and void, and confer upon the said complainant- no right to maintain or claim any interest either legal or equitable in and to the whole or any part of the land and mine in question.

102 Respondent denies that Abram Ortiz, mentioned in said cross-bill, departed from this Territory more than twenty years since, or that he has not been heard from for upwards of twenty years last past or that he had not been heard from within the seven years previous to the filing of said cross-bill, or the date of said pretended deeds of conveyance to said complainant-, and it also denies that said Abram is dead or that, if he is dead, that he died before the execution and delivery of said deeds to complainant-, or that he died without any descendants.

Respondent admits that in conformity with a certain act of Congress of the United States approved July 2, 1854, mentioned and referred to in said cross-bill, the surveyor general for the Territory of New Mexico investigated the matter and title to the land and mine in question, and examined, considered and determined upon the fact and validity of the said grant, and it also alleges that he considered and determined as to the title to said mine and lands in question and as to who was the then owner thereof, and on the twenty-fourth day of November 1860 he duly made his report and decision pursuant to said act of Congress and therein and thereby

he decided and determined the said grant to be authentic and valid; and respondent here states the fact to be that in said report and decision it was decided that the then claimants, A. Rencher, Elisha Whittelsay, Ferdinand W. Risque, Andrew J. O'Bannon, Charles E. Sherman, N. M. Miller and Thomas J. Walker (they being the same persons who had petitioned the said surveyor general for the confirmation of said title) had at the time a full and complete title to the said property; said surveyor general therefore approved said grant and recommended its final confirmation by Congress. It further states the fact to be that the said parties
103 who petitioned the said surveyor general for the confirmation of said grant, exhibited their title to the same to the said surveyor general who received them in evidence and considered and passed upon them in making up and coming to his decision in the premises, in accordance with the eighth section of the act of Congress aforesaid. It further states the fact to be that the said petitioning claimants had by an act of the legislative assembly of the Territory of New Mexico, approved February 1st, 1858, been made and constituted a corporation and body politic under the name and style of "the New Mexico Mining Company;" that after the said corporation was formed the said petitioning claimants transferred and conveyed the mine and property in question to the said corporation company; but it denies that said surveyor general decided said mine and lands to belong to or be the property of all or any one or more of the said persons from whom said complainant claims to have purchased and received the conveyance of the same.

Respondent admits that, in pursuance of the aforesaid act of Congress, the said Congress on the first day of March 1861 passed another act confirming the said claim of the above-mentioned A. Rencher, Elisha Whittlesey, Ferdinand W. Risque, Andrew J. O'Bannon, Charles E. Sherman, N. M. Miller and Thomas J. Walker, but denies that said confirmation operated in any manner to confirm said claim for the benefit of any one else than the persons last above mentioned and the said New Mexico Mining Company and its and their assigns. For a more particular description and understanding of the said act, reference is hereby made to the same in chapter sixty-six, page 887, vol. 12, U. S. Statutes at Large; which
104 said act is hereby made a part of this answer, a copy being filed herewith.

Respondent alleges that the said act of confirmation operated as a new and enlarged grant to the said A. Rencher and six others above named as petitioning claimants and to the New Mexico Mining Company as their assign and that said confirmation conferred upon and vested in the said petitioners and their assigns full and absolute title in fee-simple in and to said tract of land and all the mines thereon.

Respondent admits that the said tract of land was surveyed at the time and as stated in said cross-bill, and that the same was approved by the Commissioner of the General Land Office as therein stated, and respondent here states the fact to be that the mine in question was a permanent fixed monument, and the boundaries of

the said point being two Spanish leagues, north, south, east and west from the initial point, were necessarily fixed and easily determined by any one and not in any manner uncertain or impossible to ascertain even without an official survey, as will more fully appear by reference to the act of juridical possession of said mine and said lands.

Respondent admits that the whole of said land is situated in the county of Santa Fé and is particularly described as stated in said cross-bill.

Respondent positively denies that the said defendant "The New Mexico Mining Company" at any time whatever wrongfully, falsely or fraudulently declared or represented to any one whomsoever that the said company had acquired by purchase from any one whomsoever the property in question, but it states the fact to be that the said defendant, "The New Mexico Mining Company," had acquired
the whole of the title and estate to the whole and every part
105 and portion of the mine and land in question and so represented and claimed the same, but it denies that any such representations or declarations were either wrongful, false or fraudulent; and it further states the fact to be that the said defendant "The New Mexico Mining Company" and those holding under it through divers mesne conveyances have acquired by purchase from the legal representatives, legatees, devisees and assigns of said Jose Francisco Ortiz, the whole of the said mine and lands in question, and that the said "The New Mexico Mining Company" does come within the intent and scope of said act of confirmation and was entitled, before the sale and conveyance by it, to be recognized by the United States and all lawful authorities as the sole and only assign and owner of the said original grantees' interest in said mine and land in question, and as the sole lawful claimant for the said grant of land and mine and entitled to letters patent therefor from the United States; the said New Mexico Mining Company having acquired the title to the same by purchase and conveyance to it from said Rencher and others prior to the confirmation thereof by said act of Congress of March 1st, 1861, a schedule, synop-ical exhibit and brief of which was transmitted by the surveyor general of New Mexico along with his decision, and a copy of the original grant, papers and conveyances, and was before the Congree- at the time of its confirmation of the title in question, as a part of the decision and report of said surveyor general, a copy of which is hereby filed and made a part of this answer.

Respondent admits that the said New Mexico Mining Company did apply for letters patent to be issued in its name for all and singular the said tract of land by the President of the United States,
but it denies that it did so upon any false and fraudulent
106 declarations, representations or suggestions to any one whomsoever.

Respondent admits that two hundred and fifty-nine acres more or less of the land in question were included in the patent of the Cañon del Agua grant of land and were not included in the patent for the land in question herein.

Respondent absolutely denies that any of the declarations, representations or suggestions of the said New Mexico Mining Company with reference to the property in question, or to the title to the same, were either false or fraudulent or that said company knew that such were false or fraudulent.

Respondent admits that the President of the United States issued and delivered letters patent to the New Mexico Mining Company for the property in question, except the two hundred and fifty-nine acres aforesoid, on the 20th day of May, 1876, but it denies that he was induced and misled to do so by any false or fraudulent representations or that he had any intent to issue said letters patent to the said complainant or any of the persons under whom he pretends to claim title, or that he intended to issue the same to or for the use or benefit of any other person than the New Mexico Mining Company, which had become the claimant for said land by virtue of the conveyance to it by said A. Rencher and the said six other petitioning claimants and to which the title to the said land in question had been confirmed by the decision of the said surveyor general and by the act of Congress of March 1, 1861.

Respondent denies that the said grant to Ortiz and Cano and the examination by the surveyor general are recited in said patent, but admits that the report and survey of the surveyor general respecting the same and the act confirming the same and the conflict of description respecting the said two hundred and fifty-nine
107 acres were all recited among other things in said patent; and it further states the fact to be that, not only the foregoing matters and things were recited in the said patent, but there were many others matters and things recited in the same with reference to the title to the said mine and land, the tenor of which was to show that the said patent was properly issued, as will more fully appear by reference to a copy of said patent, which is hereby made a part of this answer and which the said respondent now prays leave to hereafter file herewith, the same not being at present in its power, possession or control.

Respondent admits that the United States by said patent gave and granted to the New Mexico Mining Company the tract of land and mine in question, as stated and set forth in said bill, with the exception and proviso in said bill mentioned.

Respondent further admits that the said New Mexico Mining Company did occupied, possess and enjoy the said tract of land as patentee thereof and remained and continued in the possession and enjoyment thereof under the same claim until it sold, transferred and conveyed the same to Stephen B. Elkins and Jerome B. Chaffee, and it further states the fact to be that not only did the said New Mexico Mining Company occupy, possess and enjoy the said land and mine from and ever since the day of the issuance of the patent therefor to it, but that the said New Mexico Mining Company did also occupy, possess hold and enjoy the said mine and land under a claim of right and title thereto ever since the date of the creation and organization of said company as a corporation in the year 1858, without any interruption or interference from any one whatever

and without any suit either in law or equity for the possession thereof being commenced and successfully prosecuted against it.

108 Respondent absolutely denies that the said complainant was at the time of the issuance of the said letters patent in any manner a representative or assign of the said Ortiz and Cano, or of the said Mexican grant by virtue of any deed or anything whatever, but states the fact to be that the said New Mexico Mining Company was the only legal representative and assign of the said Ortiz and Cano and of the said grant of land and the only owner of the said grant of land at the time of the issuance of said patent and the only person to whom said patent could lawfully issue at the date thereof.

Respondent absolutely denies that the said complainant, or his pretended assignors, or either of them, was such a person as the lands included in said patent were intended to be confirmed, assured or granted to by the said act of Congress, or that they or either of them (said complainant and his pretended assignors) were entitled to receive and enjoy said letters patent or the estate and property thereby intended to be granted or confirmed, or that the said complainant or his assignors ever had, held or possessed any estate either legal or equitable in and to the lands in question or any part thereof.

Respondent denies and says it is not true, as stated in said cross-bill, that in all and singular the proceedings had by and before the said surveyor general touching the investigation, examination, consideration and determination of the said Mexican grant and the private land claim thereunder, the said defendant, The New Mexico Mining Company, appeared and falsely and fraudulently represented itself to be the only assign and representative of the said original grantees Jose Francisco Ortiz and Ignacio Cano and of the said Mexican grant, and that it was only by force and by

109 reason of said false and fraudulent representations that the said defendant, The New Mexico Mining Company, was ever recognized by the said surveyor general as such assign and representative, but states the truth to be that said New Mexico Mining Company never made any representations to said surveyor general as to its ownership or interest in said grant, except such as were true and in accordance with the real facts.

Respondent admits that, while the said proceedings were pending before the said surveyor general preliminary to the said report and act of confirmation, the said defendant, The New Mexico Mining Company, claiming to be the assignee of the original grantees, of said grant, and claiming only as such assign and representative of said original grantees, but denies that said pretensions were false and states the fact to be that it did not only enter upon certain parts but entered into the possession of the whole thereof. It denies, as alleged in said bill or otherwise, that in all of its said acts and doings, claims and representatives before the said surveyor general, as well as in so entering upon and occupying said granted premises, the said defendant, The New Mexico Mining Company, was in no manner or degree beneficially interested or entitled in

or to the said land or premises or any part thereof, but was and it always thereafter remained merely a trustee by its own wrong and fraud aforesaid for the use and benefit of the lawful heirs and representatives aforesaid by the said Jose Francisco Ortiz.

Respondent denies absolutely that the said New Mexico Mining Company either received the said letters patent or occupied, possessed or enjoyed the estate and property therein described and granted, in trust for the use and benefit of complainant, in any respect whatever, or that the said company never acquired
110 or possessed any beneficial right, use, estate, property or interest whatever in the said letters patent, or thereunder, or in the lands and property thereof granted.

Respondent admits that the New Mexico Mining Company by deed of conveyance, by it executed, did convey to Stephen B. Elkins and Jerome B. Chaffee the tract of land so patented as aforesaid in fee-simple, but it denies that the said Stephen B. Elkins and Jerome B. Chaffee now hold the title to said land as trustees for themselves and the respondent, Lars Anderson and other persons who contributed their portion or share of the purchase-money for the same, or that the same is now held, possessed or owned by the said Stephen B. Elkins and Jerome B. Chaffee as trustees, but allege the truth to be that heretofore, to wit, on the 11th day of April, 1884, in pursuance and execution of said trust and at the request and instigation of the parties in interest, said Elkins and Chaffee reconveyed said premises to this respondent.

Respondent denies that the complainant has filed with his cross-bill any copy of the said letters patent.

Respondent admits that before it received or accepted any of the deeds of conveyance to it and before it claimed or acquired any interest in the said tract of land, it had notice of the said Mexican grant to Ortiz and Cano, but it denies absolutely any notice of any right whatever either legal, equitable or pretended, of any persons claiming to be legal representatives of the said Ortiz and Cano derived under the said grant or said act of Congress confirming the same or the said patent, except that it did have notice that the said Maraquita Montoya was the sole and only heir, legatee and devisee and legal representative of said Ortiz and Cano and was the only one who legally represented the said Ortiz and Cano as their
111 successor in the title to the land in question prior to the time of her sale and conveyance thereof to the said John Greiner, and that her assigns are the only persons since her conveyance to said Greiner, including the said A. Rencher and his associates, the said New Mexico Mining Company, this respondent and its associate owners who have owned, held or had any right or estate whatever in or to the lands in question or any part thereof.

Respondent absolutely denies that the said New Mexico Mining Company never acquired or possessed any beneficial estate, right or interest under or by means of the said letters patent, or that by such means it only acquired the nominal or legal title to said tract of land, or as trustee for said complainant or for his use or benefit,

or that it ever at any time had any notice of any such pretended facts, as alleged in said bill.

Respondent admits that the New Mexico Mining Company yielded the occupation and possession of the said land to its vendees Elkins, Anderson and Chaffee and their associates and that the same has been in the possession and occupation of said Elkins, Anderson and Chaffee and their associate owners and that they did claim and enjoy the said tract of land together with the rents, issues and profits thereof, to their own use and to the exclusion of said complainant and every one else, and that they and those through whom they claimed from and including the said Maraquita Montoya did at all times since the death of said Jose Francisco Ortiz, hold, possess, occupy and enjoy solely and exclusively the said entire tract of land and the rents, issues and profits thereof and without the consent of the said complainant or his pretended vendors who never at any time had held or possessed any right, title or estate or
112 valid claim, either in law or equity, to any part or portion of the said land in question, and that his or their consent was in no manner material or necessary to the said respondent and those through whom it claims title to the occupation, possession and enjoyment by said respondent of the lands in question; and it further states the fact to be on information and belief, that neither the said complainant nor any of his alleged or pretended vendors ever at any time heretofore, prior to the filing of said cross-bill made any legal objection or protest against said respondent and those through whom it claims title to the lands in question as aforesaid, occupying, possessing, holding or enjoying the whole or any part or portion of the lands in question, as against them or any one else; but respondent denies that the said Elkins, Anderson and Chaffee and their associates are now the owners or are now in possession of said premises, but alleges the fact to be, that on the 4th day of April 1884 the said Elkins and Chaffee, who were innocent purchasers of said premises for value, having purchased the same and paid therefor the sum of three hundred and seventy-five thousand dollars without any notice of any claim or pretended claim upon the part of complainant or of any one else to have an interest in said premises, did, upon the day last aforesaid, sell and convey said premises to this respondent who purchased the same *bona fide* and in good faith and without any knowledge of any claim of an outstanding title to said premises existing in the said complainant or in any one else.

Respondent admits that said tract of land contains valuable and growing timber and also many valuable mines and mineral beds of gold, silver, copper, lead and coal, and that the same is of
113 great value, but of what value it is not informed and therefore is unable to state the same. It also admits that it is preparing to open and operate some of the mines and mineral beds and convert the said mineral therefore to its own use, but it denies that it is cutting or preparing to cut any of said timbers or that it has any present purpose of cutting or using the same except where the same be requisite and necessary in opening and working the mines

and mineral beds aforesaid and it absolutely denies that it has committed, or is threat-ing to commit, any waste on the said tract of land. On the contrary, it states that since the purchase of the property said Elkins, Anderson and Chaffer and their associate owners, they and the respondent have spent in improving and developing the same about one hundred thousand dollars, besides paying the taxes thereon. It admits that it does intend and propose to convert the said timber, minerals and other products thereof to its own use without obtaining the consent of said complainant as it does not recognize in him any right to either consent, protest or object to the use thereof.

Respondent absolutely denies that it has any notice or knowledge of any trust existing as pretended, claimed and stated in said cross-bill in said complainant's belief, and it further denies that any such trust ever has existed or that the said complainant has, or ever has had, any right, either legal or equitable, to the said letters patent issued to the New Mexico Mining Company or to the tract of land therein described and conveyed.

Respondent absolutely denies any and all combination or confederation with any person as stated in said cross-bill, or that it has contrived how to wrong or injure the said complainant in the premises or that it has refused to do equity towards the said complainant in the premises, hereby denying that
114 he is entitled to any equitable relief in the premises. It denies that said complainant has made any repeated requests or any requests whatever of it in the premises, except so far as the same is made in any by his said cross-bill, or that he has any right on which to base any said request, and it not only pretends and denies but has at all times heretofore denied and still does absolutely deny that the said complainant is the assign of all or any part or portion of the estate, right, *table*, interest and claim whereof the said Jose Francisco Ortiz died seized or possessed of in or to the mine and tract of land in question. It admits that it pretends and does here state it as a fact, that said Maraquita Montoya, deceased, whose true name was Maria Ynes Montoya, the widow of said Jose Francisco Ortiz, inherited the said mine and tract of land as sole and only heir, legatee and devisee of said Ortiz, and that she thereafter conveyed the same to the said John Greiner, and that the said John Greiner conveyed the same to the said Abraham Rencher, Elisha Whittlesey, Ferdinand W. Risque, Andrew J. O'Bannon, C. E. Sherman, N. M. Miller and Thomas J. Walker, and that thereafter the said last-named persons or their assigns conveyed the same to the said respondent, The New Mexico Mining Company, prior to the conveyance thereof by the said company to said Elkins and Chaffee. It also admits that it does pretend and does here allege the fact to be that before the said conveyance, said Maraquita Montoya had acquired the said mine and tract of land by means of a will and testamentary writing and instrument executed by the said Jose Francisco Ortiz in his lifetime; and it further admits that it does pretend, and here states the fact to be, that the said letters patent were not intended for the benefit of the said pretended vendors

of said complainant, but that the same were intended for
115 the benefit and were solely of the said New Mexico Mining Company and its assigns as the legal and only owners thereof in law and equity from the said Jose Francisco Ortiz and said Maraquita Montoya, who was his sole and only heir and legal representative by virtue of the will aforesaid, and were also the owners thereof by virtue of having possessed, occupied, held and enjoyed by themselves and their assignors and vendors continuously and without interruption from the date of the death of said Jose Francisco Ortiz to the day of the date of said letters patent and to the date of the filing of said cross-bill, the tract of land and mine, claiming title to the same under the said original grant and grantees, their heirs and assigns by and th-ough said will and various deeds of conveyance purporting to convey an fee-simple the entire estate and title in and to said mine and tract of land. And it admits that it does pretend the fact to be that the said Elkins, Anderson, Chaffee and their associate owners, and no one else were the lawful owners and holders of said timber, mineral and other products and of all the rents, issues and profits of said tract of land and as such were entitled to appropriate and enjoy the same to their own use and to the total exclusion of the said complainant. Respondent absolutely denies that said complainant is in any manner whatever a legal representative or assign of said Jose Francisco Ortiz or Ignacio Cano with respect to the said grant, or that he in any manner is entitled to any benefit or advantage of said act of confirmation or letters patent.

Respondent further denies that any of its actings, doings or pretences is contrary to equity or good conscies, or that they tend to the wrong, injury or oppression of said complainant in the premises.

116 Respondent files herewith a translation into English of the said original grant papers to Ortiz and Cano of the said Santa Rasalia mine and said tract of land, marked "P;" also a translation into English of the said will of Jose Francisco Ortiz, marked "Q;" also a copy of the deed of conveyance of Maraquita Montoya to John Greiner of the said mine and tract of land, marked "R;" also a copy of the deed of conveyance of ——.

Respondent further states that before the complainant exhibited his said cross-bill in this honorable court, this respondent, together with its vendors, assignors, antecessors and those through whom it claims title to the mine and land in question, had had possession of the mine and lands, tenements, and hereditaments in question described in said cross-bill, for more than ten years, which said mine and lands had been granted in the year 1833 by the government of Mexico, through its officers empowered to make such grants, to their antecessors Jose Francisco Ortiz and Ignacio Cano; the said respondent and those through whom it claims title, from the time of the sale by the said Ignacio Cano to the said Jose Francisco Ortiz, and from the time of the death of the said Jose Francisco Ortiz, more than thirty years prior to the filing of said cross-bill, having held possession of the said mine and land, claiming the same under and

by virtue of divers and sundry mesne deeds of conveyance, grants and divers instruments purporting to convey an estate in fee-simple in and to the said mine and lands from the said Ortiz and Cano regularly down to the said respondent, and that no claim by suit, either in *land* or equity, effectually prosecuted has been set up or made to the said mine, lands, tenements or hereditament- within the aforesaid period of thirty years, and that said complainant in said cross-bill, and his assignors and antecessors, have neglected for the
117 said term of thirty years next prior to the filing of said cross-bill, to avail themselves of any title, legal or equitable, which *be*, she or they may have had to the said mine and lands, tenement- or hereditaments, mentioned in said bill, or any part or portion thereof, by any suit in law or equity effectually prosecuted against the person or persons so as aforesaid in possession.

And respondent further alleges and states that the said cross-bill was not filed nor the said suit herein commenced for the said lands, mine, tenements and hereditaments mentioned and described in said cross-bill, within the ten years next after the said complainants' right to commence, have or maintain said suit had come, fallen or accrued to him, his grantors or antecessors.

And respondent further alleges and states that the said complainants' cause of action did not accrue within the ten years next preceeding the filing and exhibiting of his said cross-bill in this suit.

Respondent says that on or about the — day of July, 1880, the complainants, Elias Brevoort, filed his bill in equity in the first judicial district of the Territory of New Mexico sitting in and for the county of Santa Fé, against this respondent and Jerome B. Chaffe, S. B. Elkins and R. W. Donnell, the persons through whom the respondent claims title to said premises, except R. W. Donnell, claiming the identical premises and in controversy, upon the same grounds as stated and set forth in said cross-bill, that after the filing of the said bill as aforesaid, the respondent- therein appeared and filed their answer to the same, forming the same issues of fact as are formed and answer- in this suit, except that R. W. Donnell disclaim- all interest in said premises, and that a large amount of testimony was taken, and afterwards said bill was called up and by
118 said court dismissed and a final decree rendered in favor of defendants in said action and against the complainants therein; a full true and perfect copy of which said bill, answer and all papers filed therein, together with all of the testimony taken in said cause and the decree and order entered in said cause, respondent asks leave to hereafter file in this cause, the same not being now in its possession.

Respondent further states that it is informed and believes said information to be true and therefore alleges on information and belief that prior to the filing of the cross-bill of complainant in this suit, said complainant had by deed, sold and conveyed any and all interest or pretended interest which he may have had or claimed in law or in equity to the premises in question, to some person or persons to this respondent unknown.

Respondent further states that it is informed and believes said

information to be true and therefore alleges on information and belief, that prior to the filing of the cross-bill of complainant in this suit, said complainant had by deed sold and conveyed one-half of any and all interest or pretended interest which he may have had or claimed in law or equity to the premises in question, to some person or persons to this respondent unknown.

All which matters and things this respondent is ready to aver and prove as this honorable court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

[Seal New Mexico Mining Company.]

ALFRED J. WOLF,
President, Agent, and Attorney-in-fact of the New Mexico Mining Company.
CATRON, THORNTON & CLANCY,
H. L. WALDO & WM. BREEDEN,
Sol's for Resp't.

119 TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

On this — day of February 1886, before me personally appeared the above-named Alfred J. Wolf, as president agent and attorney-in-fact of the New Mexico Mining Company, and made oath that he has read the above answer, subscribed by the above-named respondent, and knows the contents thereof and that the same are true of his own knowledge except as to the matters which are therein stated to be on information and belief, and as to those matters he believes them to be true.

——.

I W. T. Thor-ton of counsel for respondent herein, do heaeby certify that in my opinion the foregoing demurrer is well founded in point of law.

W. T. THORNTON.

Alfred Wolf being duly sworn says that he is the agent and attorney of the respondent herein and that the foregoing demurrer is not interposed for vexation or delay.

ALFRED J. WOLF.

Sworn to and subscribed before me this 15th day of February, 1886.

S. D. LASIER,
Notary Public.

And afterwards, to wit: on the 27th day of February, 1886, Elias Brevoort filed in said clerk's office an affidavit of denial, which is in the words and figures following, to wit:

District Court, County of Santa Fé.

ELIAS BREVOORT, Complainant,
vs.
THE NEW MEXICO MINING COMPANY *et al.*, Defendants. } Chancery.

TERRITORY OF NEW MEXICO,
County of Santa Fé, } *ss:*

Elias Brevoort of the said county being duly sworn, on his
120 oath says that he is the complainant in the above-entitled cause; that he does not admit but denies that the writing of Jose Francisco Ortiz and his wife, Maria Inez Montoya, set up in the answer of The New Mexico Mining Company, defendant, filed in the said cause, is genuine or duly executed.

Affiant further says, on his information and belief, that the said written instrument is not genuine, and further that the same was not executed by the said Jose Francisco Ortiz and Maria Inez, his wife, or by either of them.

Affiant further says that his said information, upon which he bases his said belief, was in part derived personally and directly from the late Joab Houghton, now deceased, who was at one time chief justice of the Territory of New Mexico, and was afterwards counsel for the said Maria Inez Montoya, the widow of the said Jose Francisco Ortiz at the time that she had certain transactions with one John Grainer, which involved the execution by her of a certain deed of conveyance relative to her pretended interest in the Ortiz Mine grant, claimed by her as heir of her said deceased husband; that the said Joab Houghton, in personal conversation with this affiant, expressly told this affiant that, during the negotiations concerning the said transaction between the said widow and the said John Greiner, the said Joab Houghton as counsel in the said business obtained from the said widow all the papers in her possession relating to the title of the said Ortiz Mine grant; that there was no will or testamentary writing among the said papers; that he, the said Joab Houghton, particularly enquired of the said widow, when he obtained the said paper, whether or not there was any will of the said Jose Francisco Ortiz in existence or whether or not the said Ortiz had ever made any will or testamentary disposition
121 of his property, and that the widow declared to said Joab Houghton that no such will or testamentary writing was in existence, and that the said Ortiz had never executed such, and moreover that she and her husband had never even had any conversation on the subject of making a will; that he is informed and believes that upon the acceptance by the said John Greiner of the said deed, the said Joab Houghton certified to said John Greiner in writing that the said Ortiz had died intestate.

ELIAS BREVOORT.

Subscribed and sworn to before me by said affiant Elias Brevoort personally, this 27th day of February, A. D. 1886.

[SEAL.] R. W. WEBB, *Clerk.*

And afterwards, to wit: on the 2d day of July, 1886, said parties, by their respective solicitors, filed in said clerk's office their stipulation, allowing the intervention of C. H. Gildersleeve in this cause, which is in the words and figures as follows, to wit:

District Court, Santa Fé County.

EDWARD T. FARISH *et al.*
vs.
THE NEW MEXICO MINING COMPANY *et al.*

It is hereby stipulated and agreed by and between the parties hereto, by their respective solicitors, that Charles H. Gildersleeve have leave to file and interpose an intervening petition, setting up and claiming his interest in the property and subject-matter of said suit, and that the same and his rights therein shall be adjudicated and determined to the same extent as though he had been a party to said cause in the first instance.

FRANCIS DOWNS,
Solicitor for Compl'ts.
CATRON, THORNTON & CLANCY,
GILDERSLEEVE & KNABEL,
Sol's for Defendants.

122 And afterwards to wit: on the same day and year last aforesaid, July 2d, 1886, an order was made and entered of record by said court in said cause, which is in the words and figures following to wit:

EDWARD T. FARISH *et al.*
vs.
THE NEW MEXICO MINING COMPANY *et al.* } 1490. Chancery.

On reading and filing the stipulation of parties, complainant and defendant, in the above-entitled cause, respecting the filing of an intervening petition by C. H. Gildersleeve, and on reading said petition, it is ordered that leave be and the same is hereby given to C. H. Gildersleeve to file a petition of intervention in said cause, setting forth all his claim of interest in the property in litigation, that the same and all his rights therein shall be preserved adjudicated and determined to the same effect and extent as though he had been made a party to said suit in the first instance. It is further ordered that such stipulation be spread of record as part of the proceedings herein.

ELISHA V. LONG, *Judge.*

And afterwards to wit: on the day and year last aforesaid, July 2d, 1886, said Charles H. Gildersleeve filed in said clerk's office his intervening petition in said cause, which is in the words and figure following, to wit:

TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

In the District Court of the First Judicial District, Territory of New Mexico, Sitting within and for the County of Santa Fé, for the Trial of said Causes Arising under the Laws of the Territory, at the July Term, A. D. 1886.

123 EDWARD T. FARISH, BENJAMIN M. REED, LARKIN G. REED, Alexander Reed, Modesto Ortiz de Martinez and Transito Ortiz, Her Husband,

vs.

THE NEW MEXICO MINING COMPANY, STEPHEN B. ELKINS, Jerome B. Chaffee, Lars Anderson, L. M. Lawson, and Elias Brevoort.

To the Honorable Elisha V. Long, chief justice of the supreme court of the Territory of New Mexico and judge of the first judicial district court thereof:

Your petitioner, Charles H. Gildersleeve, a resident of the city and county of Santa Fé and Territory of New Mexico, respectfully represents and shows unto your honor that he has an interest in the matter in litigation between the respective parties, complainants and defendants, in the above-entitled cause, and to that end, in so far as none of his interests are or shall be prejudiced thereby, unites with the defendant, Elias Brevoort, in resisting the claim of both parties, complainant and defendant, and all other parties to said suit whose claim conflicts in any manner with that of your petitioner as hereinafter set forth more fully.

Your intervenor, now and at all times saving and reserving to himself all manner of benefit or advantage that may be taken to the many errors, uncertainties and imperfections, in complainants' bill of complaint contained for answer thereto or unto so much thereof as this intervenor is advised is material or necessary for him to answer unto, answers and says:

That he admits that in the year 1843, Jose Francisco Ortiz and Ignacio Cano, now both deceased, registered in the office of Francisco Baca y Ortiz, a mineral vein of gold-bearing rock and petitioned that the same be granted them, and also further petitioned for the privilege of water supplies and pasturage, all of which
124 was duly granted, then, at the time, and in the manner and to the extent as stated in said bill of complaint, and that thereupon they and their heirs and assigns became vested with the ownership and all right, title and interest in and to said mine and land adjacent thereto, and that under the law- of New Mexico, then in force, and the treaty of Guadalupe Hidalgo, they became entitled to a confirmation of said grant as stated in said bill of complaint.

This intervenor also admits that at the time said grant was originally made by the authorities of the Mexican government, Jose Francisco Ortiz and Ignacio Cano were tenants in common and

each an owner of an undivided one-half part of said grant, but denies that said Cano died seized and possessed of any portion of said grant, or that Ortiz, after such death, continued to hold possession of said mine and land connected therewith for the use of himself and all the heirs-at-law of the said Ignacio Cano, and this intervenor here states the fact to be that previous to the death of said Cano, about the year 1834, the exact date of which this intervenor is unable to state, said Cano, for a good, valid and sufficient consideration, sold, transferred and conveyed to Jose Francisco Ortiz all his right, title and interest in and to said mine, lands and grant and every part thereof, formally delivering possession thereof in person as the universal custom then in vogue in New Mexico, and that Jose Francisco Ortiz then entered into the exclusive possession of said mine, land and grant, worked, used, occupied and enjoyed the same till the time of his death in the year 1848; that since that time the heirs of said Francisco Ortiz and your intervenor's grantor and his trustees, and persons for his use and benefit, have been in the whole, entire and exclusive possession of said mine, land and grant.

125 This intervenor is not advised as to whether said Ignacio Cano left any children or heirs-at-law or whether he died intestate, or whether the parties named in the bill were or are his children and were married in the manner and in the time stated in said bill of complaint, hence this intervenor neither admits nor denies the statement in said bill of complaint with reference thereto.

Your intervenor shows unto your honor that in the year 1848, the said Jose Francisco Ortiz did die intestate in the said county and Territory, leaving no direct heirs, ascendent or descendent, and that his only heirs-at-law, him surviving, were an only sister, named Maria de la Luz Ortiz, and the children of his only brother Ignacio Ortiz, then deceased.

That said Ignacio Ortiz died intestate prior to the death of the said Jose Francisco Ortiz, but in what year this intervenor is not informed and therefore cannot state. That said Ignacio Ortiz left him surviving as his own heirs-at-law six children, named Abram, Estefana, Esmerejilda, Prudencia, Macedonia and Ramona, and that all the above-named heirs of the said Jose Francisco Ortiz, children of his said brother Ignacio, excepting the said Abram Ortiz, long before the filing of said bill of complaint, by divers deeds of conveyance, by them respectively duly made, executed and acknowledged and delivered to Elias Brevoort for valuable considerations, from him to them moving, duly granted, bargained, sold and conveyed to Elias Brevoort, his heirs and assigns, all their several estates, rights, titles, interests and claims in and to the said mine, land and grant, in virtue of descent from the said Ignacio Ortiz aforesaid.

126 And your intervenor further shows that Maria de la Luz Ortiz, the sister of the said Jose Francisco Ortiz intermarried with Manuel Sanchez, and thereafter, to wit: in the year 1860, died intestate, leaving her surviving as her *own* heirs-at-law five children of her said marriage, namely: Esmerejildo, Domingo,

Ignacio, Herenio and Rosaria; that the said Rosaria intermarried with one Rafael Romero and she and her husband thereafter died intestate, but at what particular time this intervenor is not informed and cannot estate, leaving as the only issue of their said marriage and the only heir-at-law of the said Rosaria, an only daughter, named Josefa Romero, who thereafter intermarried with one Jesus Garcia. That all of the above-named heirs of the said Jose Francisco Ortiz, deceased, of his said sister Maria de la Luz, namely, the said Esmerijildo, Domingo, Ignacio, Herenio and Josefa Romero, long before this action, by divers deeds of conveyance by them respectively duly made, executed, acknowledged and delivered to Elias Brevoort for a valuable consideration from him to them moving, duly granted, bargained, sold and conveyed to him, his heirs and assigns, all their estates, rights, titles, interests and claims in and to the said mine, land and grant in virtue of descent from the said Maria de la Luz, sister as aforesaid of the said Jose Francisco Ortiz, as will more fully appear by a reference to the said several deeds of conveyance so made and delivered to the said Elias Brevoort, which your intervenor craves leave to produce before your honor's court, copies of which this intervenor begs leave to file in said cause with leave to refer to, etc.

This intervenor further shows, on information and belief, that the said Abram Ortiz departed from this Territory more than 20 years since, leaving behind him no issue; that he has not been heard of from upwards of 20 years last past, and that prior to the execution and delivery of the said deeds last mentioned,
127 he died intestate without direct heirs ascendant or descendant him surviving and long before the commencement of this action.

Your intervenor further shows that heretofore, to wit: on the 30th day of June, A. D. 1880, the said Elias Brevoort made, executed, acknowledged and delivered to your intervenor and one John H. Knaebel, a deed to the undivided one-half part of, in and to said mine, land and grant, by the terms of which said deed and conveyance, your intervenor and the said John H. Knaebel became the owners of the undivided one-half interest thereof as tenants in common, that is to say: the said John H. Knaebel then and there became the owner of the undivided one-fourth part of said mine, land and grant, and your intervenor, the owner in his own right of the other one undivided one-fourth part of said mine, and grant, as will more fully appear from said deed of conveyance herewith filed, reference thereunto being had, and that your intervenor is now the owner of said undivided one-fourth interest in said mine, land and grant in his own right.

Your intervenor denies that the said Jose Francisco Ortiz died intestate, leaving his widow all or any of his right, title and interest in and to said mine, land and grant, or that he ever made any will whatever in favor of his said wife, and also denies that the heirs and legal representative of Jose Francisco Ortiz are in any manner limited to an undivided one-half of said grant.

Your intervenor admits that in conformity with an act of Con-

gress, said grant was duly investigated, considered and determined by the surveyor general of New Mexico as stated in said bill of complaint.

Your intervenor also admits that the New Mexico Mining Company committed the false and fraudulent representations to
128 the Commissioner of the General Land Office, the Secretary of the Interior and *the* Ulysses S. Grant, President of the United States, and thereby fraudulently procured the issuance of a patent as stated in said bill of complaint.

Your intervenor admits that the New Mexico Mining Company received the said letters patent and the estate and property therein described and granted in -rust, but denies that the same was in any manner in trust for the use and benefit of the heirs-at-law of said Cano, or their assigns, but states that the same was received and is held in trust for the said Elias Brevoor*f* and his assigns, as the sole and only grantee of the heirs of the said Jose Francisco Ortiz, deceased, and for his use and trust and for no one else.

Your intervenor also admits that not only as to half but states that as to all of said estate and property, the New Mexico Mining Company never acquired or possessed any beneficial use, property, estate or interest, whether in said letters patent or under the same or in the lands and property therein described and granted.

Your intervenor denies all and all manner of unlawful combination and confederacy without this, that there is any other matter, charge*d*, cause*d* or claim*ed* in said bill of complaint contained material or necessary for him to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed or avoided or denied, is true to his knowledge and belief, all which matters and things he is ready and willing to aver, prove and maintain as this honorable court may direct.

The premises being found for your intervenor, he prays judgment and decree of your honor's court, awarding and decreeing unto him an undivided one-fourth part of all and singular said mine, land and grant as aforesaid, free and clear of and from all claims
129 and demands; and the heirs of the said Ignacio Cano and their grantees and the New Mexico Mining Company and its grantees and Elias Breevort, and that your intervenor may generally have such other and further relief in the premises as the nature of the case may require, and as to your honor may seem meet and just, and your intervenor will ever pray.

C. H. GILDERSLEEVE, *Intervenor.*
GEO. C. PRES*E*ON,
THOMAS S*N*ITH,
FISKE & WARREN,
Sol's for Intervenor.

And afterwards, to wit: on said 2d day of July, 1886, the said petitioner filed with said petition an exhibit which is in the words and figures following, to wit:

Know all men by these presents: Whereas the New Mexico Mining Company, a corporation organized under the laws of the Terri-

tory of New Mexico, claiming title to the Ortiz Mine grant, a tract of land situated in the county of Santa Fé, Territory of New Mexico, containing according to the surveyor general of the said Territory, 69,458.33 acres of land, and basing such claims upon the allegation that said company had acquired by purchase, estate, right, title, interest and claim of the original Mexican grantees, to whom the said grant was made and claimed to be entitle- to all of the benefits of a certain act of confirmation passed by the Congress of the United States, approved March 1st, 1861, entitled, "An act to confirm a certain private land claim, in the Territory of New Mexico," applied for and procurred to be issued to it, the said New Mexico Mining Company, certain letters patent of the United States of America, under the offi-
130 cial hand of Ulysses S. Grant, President of the United States aforesaid, and under the seal of the General Land Office aforesaid, and bearing date the 20th day of May, in the year 1876, wherein and whereby the United States aforesaid gave and granted unto the said The New Mexico Mining Company and its successors and assigns, the tract of land embraced and described in the said survey, excepting and reserving from the transfer by the said letters patent, so much of the land embraced in the said survey as is included within the survey of the Cañon del Agua grant, approved by the said surveyor general, on the 16th day of October, A. D. 1866, and patented to Jose Serafin Ramirez, his heirs and assigns, on the 1st day of July, A. D., 1875, and estimated to contain about 256 acres, and with the further stipulation that in virtue of the provisions of the aforesaid act of Congress, approved March 1st, A. D. 1861, the confirmation of the said claim and the said patent thereof, should only be construed as quitclaim or relinquishment on the part of the United States, and should not affect the adverse rights of any other person whomsoever; and whereas thereafter the said The New Mexico Mining Company pretended to convey the said patented grant or tract of land, to wit: the said Ortiz Mine grant to one Stephen B. Elkins, and by means of the said Stephen B. Elkins, certain other persons, to wit: R. W. Donnell, Lars Anderson and Jerome B. Chaffee, or some one of more of them claim to have acquired interest in said Ortiz Mine grant.

And whereas, the undersigned, Elias Brevoort of the city and county of Santa Fé, in said Territory, claims to be the legal and equitable owner of the said Ortiz Mine grant, and further claims that the said letters patent were issued to the said New Mexico
131 Mining Company in trust for him, the said Elias Brevoort, and that the conveyance so made to the said Stephen B. Elkins, and all rights, titles, estates and interest acquired by the said Stephen B. Elkins, R. W. Donnell, Lars Anderson and Jerome B. Chaffee, or by any other persons, under or in subordination the said letters patent are subject to the same trust, and further claims that the said Elias Brevoort is entitled to have the said letters patent delivered to him, and proper deeds of conveyance and release made and delivered to him, by all the said parties now claiming adversely to him, and to be put into the full and peaceable, legal

and equitable occupation and possession of all and singular the said tract of land, or the greater part thereof, and is also entitled to pecuniary damages and compensation in the premises. And whereas, Charles H. Gildersleeve and John H. Knaebel, composing the firm of Gildersleeve & Knaebel, have, at the request of the said Elias Brevoort, and on the faith of this instrument prepared a bill in equity to be filed in the first judicial district court of the said Territory, in and for the said county of Santa Fé, for the purpose of obtaining for the said Elias Brevoort, as against the said several parties above named, the relief to which he is entitled to the premises, and are about to prosecute the said action and all the other necessary actions to a definite result, and have undertaken to advance the disbursements necessary to that end. Now, in consideration of the premises, and of the sum of one dollar, to me by the said Charles H. Gildersleeve and John H. Knaebel, in hand paid, the receipt whereof is hereby acknowledged, I the said Elias Brevoort, have granted, bargained, sold, remised, released and conveyed, and by these presents, I do grant, bargain, sell, remise, release and convey to, and to the use of the said Charles H. Gildersleeve and John H.
132 Knaebel, and their heirs and assigns, all the undivided one-half part of all my estate, right, title, interest, claim and demand, of, in and to all and singular the said Ortiz Mine grant, situate in the county of Santa Fé, Territory of New Mexico, containin-69,458.33 acres, to have and to hold, the above-granted one undivided half of the said lands and premises with the appurtenances to and to the use of the said Charles H. Gildersleeve and John H. Knaebel, as tenants in common, and their heirs and assigns forever. Subject, however, to one-half of the claims for purchase-money of the said premises not matured against the said Elias Brevoort, and expressed in the several deeds of conveyance of the said premises heretofore made to him. And also, one undivided half of all claims and demands, existing or which may accrue in favor of the said Elias Brevoort, against the said The New Mexico Mining Company, Stephen B. Elkins, R. W. Donnell, Lars Anderson and Jerome B. Chaffee, or any one or more of them, by reason of their interference with the said lands or the said letters patent, or anything growing thereout.

In witness thereof I have hereunto set my hand and seal, this 30th day of June, in the year 1880.

[SEAL.] ELIAS BREVOORT.

Signed, sealed and delivered in the presence of
W. J. DOUGHERTY.

TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

On this, the 1st day of July, in the year 1880, before me, F. W. Clancy, clerk of the first judicial district court of the Territory of New Mexico, personally appeared Elias Brevoort, of the county of Santa Fé, Territory aforesaid, to me well known to be the person

whose name is subscribed to the foregoing instrument of
133 writing, and acknowledged that he signed, sealed and executed the same for the uses and purposes therein mentioned.
Witness my hand and the seal of said court the 1st day of July, 1880.

F. W. CLANCY, *Clerk.*

Filed for record in my office this 3d day of September, 1885, at 5 o'clock p. m.

[SEAL.] JOHN GRAY,
Clerk and Recorder,
Per M. GARCIA, *D. C.*

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

I, John Gray, clerk of the probate court, and *ex officio* recorder, in and for the county of Santa Fé, in the Territory of New Mexico, certify that the foregoing deed was filed in my office for record on the 3d day of September A. D. 1885, at 5 o'clock p. m., and the same is duly recorded in Book "O," the Record of Deeds, etc., of said county of Santa Fé, on pages 74, 75, 76, 77 and 78, also recorded in Book "H," of Mining Deeds, pages 195 to 199 inclusive.

In witness whereof I have hereunto set my hand and seal, this 22d day of June, A. D. 1886.

JOHN GRAY,
Clerk and ex Officio Recorder, Santa Fé County,
Territory of New Mexico,
[SEAL.] Per M. GARCIA, *D. C.*

And afterwards, to wit: on the 8th day of July, 1886, said Charles H. Gildersleeve filed in said clerk's office, his petition for leave to file a cross-bill herein, together with five exhibits, which said petition and affidavits are in the words and figures following to wit:

134 TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

In the District Court, Santa Fé County, July Term, A. D. 1886.

ELIAS BREVORT
vs.
THE NEW MEXICO MINING COMPANY *et al.* } Chancery Cross-bill.

To the Hon. E. V. Long, chief justice of the supreme court of the Territory of New Mexico and judge of the first judicial district court thereof:

Your petitioner, Charles H. Gildersleeve, a resident of the county of Santa Fé, aforesaid, heretofore, to wit: on the 30th day of June, A. D. 1880, together with John H. Knaebel, purchased from Elias Brevoort, who was then the owner thereof, the undivided one-half interest in and to the Ortiz Mine grant, situate in the county of Santa Fé aforesaid, containing over 69,000 acres of land as con-

firmed by Congress and patented by the duly constituted authorities of the Government of the United States; that on the same day Elias Brevoort executed and delivered to your petitioner and said John H. Knaebel, a deed of conveyance therefor, which said deed was duly signed, acknowledged and recorded as will more fully appear by reference thereto, a copy thereof being herewith filed marked Exhibit I, reference thereunto being had.

That thereupon your petitioner, the said Elias Brevoort and John H. Knaebel, became the owners of said grant of land as tenants in common, the said Elias Brevoort then being the owner of one-half thereof, the said John H. Knaebel, one-quarter thereof, and as such, owned, held and possessed said grant up to the time of the actings, doings and conveyances hereinafter set forth.

135 That while they thus held, owned and possessed said grant, a suit in chancery was commenced, to wit: on the 29th day of January, 1883, in this honorable court, wherein Edward T. Farish, Benjamin M. Read, Alexander Reed, Modesto Ortiz de Martinez and Transito Ortiz, her husband, were complainants, and the New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee, Lars Anderson, L. M. Lawson and said Brevoort, that the name of Elias Brevoort alone should be used for the purposes of asserting the rights, titles, interests, claims and demands of said Brevoort, Knaebel and your petitioner, and that all papers, answers, cross-bills, pleadings and all proceedings in and about said suit affecting their interest therein, should be made, filed, interposed and conducted in the name of the said Elias Brevoort, but in trust, however, for the use and benefit of said Elias Brevoort, Knaebel and your petitioner; that in pursuance of said agreement and understanding, your petitioner and John H. Knaebel acting as solicitors therein prepared and filed in the name of Elias Brevoort an answer to said suit, and also a cross-bill thereto, setting out such facts and claims therein as were proper and requisite to fully save and protect the rights of said Brevoort in the premises as well as the rights and interests of your petitioner and John H. Knaebel therein; that at various times during the pendency of said suit, the New Mexico Mining Company, the principal party in interest therein, adverse to said Brevoort and Knaebel and your petitioner, through its agents, officers, solicitors and representatives tried to effect a settlement and compromise of the claim to said grant set up by said Brevoort in said cross-bill, it, the said New Mexico Mining Company, having notice and full knowledge of your petitioners' interest therein, and offered your petitioner on several occasions large

136 amounts of the capital stock of said company, and in addition thereto large sums of money; that said Brevoort at times seemed disposed to look with favor on such offers, but your petitioner, having the utmost faith in the favorable determination of his suit, always refused such offers and advances and advised said Brevoort to not entertain them.

Whereupon the said Brevoort always appeared to acquiesce in your petitioner's determination, and always promised and assured your petitioner that he would never make nor entertain any offer

of compromise or settlement, or sell or dispose of said property without first consulting your petitioner; that as said Brevoort was without means to pay the necessary disbursements in and about said suit for his portion thereof, your petitioner, at his request, from time to time advanced all the moneys necessary to that end. Your petitioner having the utmost confidence in the promises and undertakings of said Brevoort, well hoped that he would carry out the same, and faithfully and honorably carry out his trusts therein, according to his promise.

But now, so it is, your honor, the said Brevoort, about the 18th day of June, 1886, without consulting, advising or notifying your petitioner, undertook to settle said suit by deeding all of said property, lands and grants to the said New Mexico Mining Company, and by attempting to dismiss said cross-bill.

That on the same day the said John H. Knaebel also deeded to the New Mexico Mining Company his one-fourth interest in said grant, without advising or notifying your petitioner. Said attempts to compromise and dismiss said cross-bill and the making and executing said deeds were done during your petitioner's absence from the city; immediately upon learning thereof, your petitioner
137 called upon said Brevoort and asked an explanation regarding said alleged settlement, compromise and dismissal, but that said Brevoort refused to give your petitioner any information on the subject merely stating that your petitioner must look out for himself; that said Brevoort then and there informed your petitioner that he and Knaebel had merely settled their interest in the litigation with the New Mexico Mining Company, that he, Brevoort had agreed to convey his one-half interest therein; that the New Mexico Mining Company was informed by him that your petitioner held, owned and possessed a one-quarter interest in the grant, and of the trust aforesaid; and that said compromise and settlement was not intended to affect the interest of your petitioner therein and that he gave and exhibited to A. J. Wolf, he being the agent and representative of the New Mexico Mining Company and acting for it and in its behalf in and about said settlement and compromise, and the procurement of said deeds and conveyance, a copy of the deed of conveyance from said Brevoort to your petitioner.

But as a matter of fact, the deed from Brevoort to the New Mexico Mining Company as recorded in the records of Santa Fé county, is for the entire grant without any reservation whatever in favor of your petitioner, and is in violation and contravention of said agreement and trust thereby created.

Your petitioner at the same time called upon his late partner, John H. Knaebel, who informed him that it was true that himself and Brevoort had settled with the New Mexico Mining Company, but on what terms declined to inform your petitioner excepting that it was distinctly understood that the New Mexico Mining
138 Company had full knowledge and notice of the inter-st of your petitioner in the premises and that said settlement or compromise should in no manner operate as against any one but

Brevoort and Knaebel, and should not prejudice your petitioner's rights in said grant and suit.

Your petitioner further states that he is informed and believes that the New Mexico Mining Company now gives out and claims that the settlement made by it with Brevoort and Knaebel effectually and forever bars your petitioner's rights in the premises; that the entire estate in litigation has passed to it by said deeds, and your petitioner is remediless in the premises, and petitioner here charges that any such pretentions made are in fraud of the rights of your petitioner in the estate in controversy; that any such settlement or compromise or dismissal of said suit bar-ing or attempting to bar the rights of your petitioner in the premises are fraudulent and in pursuance of conspiracy to injure and defraud your petitioner.

That in order to enable your petitioner to effectually obtain all the relief and assert all the rights to which he is entitled as owner of one undivided one-quarter of said grant, as heretofore set forth, it is necessary to claim said relief, and the same can be only effectually set up by and through the medium of said cross-bill filed in the name of the said Brevoort, trustee as aforesaid for the use of your petitioner.

Your petitioner further shows that the attempted dismissal of said cross-bill is informal and not of a character of which your honor is bound to make cognizance, in that it is not entitled in any cause pending in this court.

Your petitioner therefore prays that he be permitted to be-
139 come party complainant in said cross-bill in his own name and right, and that leave be given him to amend the same by setting forth his said individual title and interest in and to the said real estate and property, and to prosecute the same to final judgment in his own right, and that the said dismissal of said cross-bill on the part and behalf of said Brevoort be allowed and entered in said cause only so far as effects the rights and interests of said Brevoort and Knaebel, respectively, and not as effects the rights and interests of your petitioner.

And that your petitioner may have such other and further relief generally in the premises as the nature of the case may require and as to your honor shall seem meet and just, and your petitioner will ever pray.

C. H. GILDERSLEEVE,
GEO. C. PRESTON,
FISKE & WARREN,
THOMAS SMITH,
Sol's for Petitioner.

EXHIBIT 1.

Know all men by these presents: Whereas the New Mexico Mining Company, a corporation organized under the laws of the Territory of New Mexico, claiming title to the "Ortiz Mine grant," a tract of land situate in the county of Santa Fé, Terri-

tory of New Mexico, containing, according to the survey thereof, by or under the direction of the surveyor general of said Territory, 69,458.33 acres of land, and basing such claim on the allegation that the said company had acquired, by purchase, estate, right, title, interest and claim of the original Mexican grantees to whom the said grant was made, and claiming to be entitled to all the benefit of a certain act of confirmation passed by the Congress of the United States, approved March 1st, 1861, entitled "An act to confirm a certain
140 private land claim in the Territory of New Mexico," applied for and procured to be issued to it, the said New Mexico Mining Company, certain letters patent of the United States of America, under the official hand of Ulysses S. Grant, President of the United States aforesaid, and under the seal of the General Land Office of the United States aforesaid, and bearing date the 20th day of May, in the year 1876, wherein and whereby the United States aforesaid gave and granted unto the said New Mexico Mining Company, and to its successors and assigns, the tract of land embraced and described in the said survey, excepting and reserving from the transfer by the said letters patent, as much of the land embraced in said survey as included within the survey of the Cañon del Agua grant, approved by the said surveyor general on the 16th day of October, A. D. 1886, and patented to Jose Serafin Ramirez, his heirs and assigns, on the 1st day of July, A. D. 1875, and estimated to contain about 259 acres, and with the further stipulation, that in virtue of the provisions of the aforesaid act of Congress, approved March 1st, A. D. 1861, the confirmation of the said claim and the said patent thereof should only be construed as quitclaim or relinquishment on the part of the United States, and should not affect the adverse rights of any other person or persons whomsoever. And whereas, thereafter, the said "the New Mexico Mining Company" pretended to convey the said patented grant or tract of land, to wit: "the said Ortiz Mine grant" to one Stephen B. Elkins, and by means of the said Stephen B. Elkins, to certain other persons, to wit: R. W. Donnell, Lars Anderson and Jerome B. Chaffee, or some one or more of them claim to have acquired interest in the said "Ortiz Mine grant."

141 And whereas, the undersigned, Elias Brevoort, of the city and county of Santa Fé, in the said Territory, claims to be the legal and equitable owner of the said "Ortiz Mine grant," and further claims that the said letters patent were issued to the said New Mexico Mining Company, in trust for him, the said Elias Brevoort, and that the conveyance so made to the said Stephen B. Elkins, and all rights, titles, estates and interests acquired by the said Stephen B. Elkins, R. W. Donnell, Lars Anderson and Jerome B. Chaffee, or by any other person under or in subordination to the said letters patent, are subject to the same trust, and further claims that the said Elias Brevoort is entitled to have the said letters patent delivered to him, and proper deeds of conveyance and release made and delivered to him, by all the said parties now claiming adversely to him, and to be put into the full and peaceable, legal

and equitable occupation and possession of all and singular, the said tract of land, or the greater part thereof, and is also entitled to pecuniary damages and compensation in the premises.

And whereas, Charles H. Gildersleeve and John H. Knaebel composing the firm of Gildersleeve & Knaebel, have, at the request of said Elias Brevoort, and on the faith of this instrument prepared a bill in equity to be filed in the first judicial district court of the said Territory, in and for the said county of Santa Fé, for the purpose of obtaining for the said Elias Brevoort, as against the several parties above named, the relief to which he is entitled to in the premises, and are about to prosecute the said action, and all the other necessary action- to a definite result, and have undertaken to advance the disbursements necessary to that end. Now in consideration of the premises, and of the sum of one dollar to me by the said Charles H. Gildersleeve and John H. Knaebel, in hand paid,
142 the receipt whereof is hereby acknowledged, I, the said Elias Brevoort, have granted, bargained, sold, remised, released and conveyed, and by these presents I do grant, bargain, sell, remise, release and convey to, and to the use of the said Charles H. Gildersleeve and John H. Knaebel, and their heirs and assigns, all the one undivided half part of all my estate, right, title, interest, claim and demand of, in and *any* to all and singular the said Ortiz Mine grant, situated in the county of Santa Fé, Territory of New Mexico, containing 69,458.33 acres to have and to hold, the above-granted one undivided half of the said lands and premises, with the appurtenances to and to the use of the said Charles H. Gildersleeve and John H. Knaebel, as tenants in common, and their heirs and assigns forever. Subject, however, to one-half of the claims for purchase-money of the said premises not yet matured against the said Elias Brevoort, and expressed in several deeds of conveyance of the said premises heretofore made to him. And also, one undivided half of all claims and demands, existing or which may accrue in favor of the said Elias Brevoort against the said, The New Mexican Mining Company, Stephen B. Elkins, R. W. Donnell, Lars Anderson and Jerome B. Chaffee, or any one or more of them, by reason of interference with the said lands or the said letters patent, or anything growing thereout.

In witness whereof, I have hereunt- set my hand and seal, this 30th day of June in the year 1880.

[SEAL.] ELIAS BREVOORT.

Signed, sealed and delivered in presence of—
W. J. DOUGHERTY.

TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

On this 1st day of July, in the year 1880, before me, F. W.
143 Clancy, clerk of the first judicial district court of the Territory of New Mexico, personally appeared Elias Brevoort, of the county of Santa Fé, Territory aforesaid, to me well known to be the person whose name is subscribed to the foregoing instrument of

writing, and acknowledged that he signed, sealed and executed the same for the uses and purposes therein mentioned.

Witness my hand and the seal of said court the first day of July, 1880.

[SEAL.] F. W. CLANCY, *Clerk.*

Filed for record in my office this 3rd day of September, 1885, at 5 o'clock p. m.

JOHN GRAY,
Clerk and Recorder,
[SEAL.] Per M. GARCIA, *D. C.*

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

I, John Gray, clerk of the probate court, and *ex officio* recorder in and for the county of Santa Fé, in the Territory of New Mexico, certify that the foregoing deed was filed in my office for record on the 3d day of September, A. D. 1885, at 5 o'clock p. m., and the same is duly recorded in Book "O," the record of deeds, etc., of said county of Santa Fé, on pages 74, 75, 76, 77, and 78, also recorded in Book "H" of Mining Deeds, pages 195 to 199 inclusive.

In witness whereof, I have hereunto set my hand and seal this 22d day of June, 1886.

JOHN GRAY,
Clerk and ex Officio Recorder, Santa Fé County,
Territory of New Mexico,
[SEAL.] Per M. GARCIA, *D. C.*

144 EXHIBIT 2.

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

John Gray, being duly sworn, on his oath states that he is probate clerk and recorder of deeds of the county of Santa Fé aforesaid, and that Marcelino Garcia is his only deputy, and as such authorized to do and transact all the business of said office, and attends to the filing and recording of deeds and instruments or writing; that on the 18th day of June, 1886, his said deputy was sick, and not in or about said office; that on said day one Alfred J. Wolf, agent of the New Mexico Mining Company, appeared in said office in a great hurry and asked the immediate recording of two certain deeds, one from John H. Knaebel and one from Elias Brevoort, both being in favor of the New Mexico Mining Company; that this affiant was directed by said Wolf to record them at once, and did not then examine the files of said office to ascertain whether there were any other deeds or instruments to be recorded prior to those so presented by said Wolf; that said Wolf at the time stated to affiant that Charles H. Gildersleeve had a contract or deed from Mr. Brevoort, that he could not find them recorded; but that it was their business to see that they were recorded; that affiant, in pur-

suance of the directions of said Wolf recorded said deeds on the 18th day of June, 1886; that several days thereafter his said deputy Marcelino Garcia, for the first time since his illness, came in the office and called affiant's attention to the fact that there was for record on the files of said office a deed from Brevoort to C. H. Gildersleeve to an interest in the same property attempted to be sold by Brevoort to the New Mexico Mining Company; that said deed of said Charles H. Gildersleeve was duly filed in the office of
145 affiant and should have been recorded previous to the deeds from Brevoort and Knaebel to the New Mexico Mining Company, but that this affiant was not aware thereof until his attention was first called to that fact by his said deputy.

JOHN GRAY.

Subscribed and sworn to before me this 28th day of June, 1886.
[SEAL.] R. M. JOHNSON, *Clerk.*

EXHIBIT 3.

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

Marcelino Garcia, being duly sworn, on his oath states that he is deputy clerk and recorder of the county of Santa Fé aforesaid; that previous to the 18th day of June, 1886, Charles H. Gildersleeve delivered to affiant a deed of conveyance from Elias Brevoort to said Charles H. Gildersleeve and one John H. Knaebel, for record, said deed being delivered to affiant at the office of the clerk and recorder of deeds for said county; that this affiant then filed the same for record, and was directed to record the same at a time previous to the recording of two certain deeds from Elias Brevoort and John H. Knaebel, recorded on the 18th day of June, 1886; that owing to the illness of this affiant, which lasted several days, said deed was not recorded as directed by Charles H. Gildersleeve, but was placed by him in his drawer in said office kept for that purpose, where unrecorded instruments were usually deposited and kept for safe keeping previous to record.

MARCELINO GARCIA.

Subscribed and sworn to before — this 28th day of June 1886.
[SEAL.] JOHN GRAY,
Clerk Probate Court, Santa Fé County, N. M.

146 EXHIBIT 4.

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

R. W. Webb being duly sworn, on his oath states, that about the 20th of June last past, in a conversation with A. J. Wolf, agent of the New Mexico Mining Company, he stated to the affiant that he had purchased for the New Mexico Mining Company, the one-half in-

terest of Elias Brevoort and the one-quarter interest of John H. Knaebel in the "Ortiz Mine grant;" that as far the remaining one-quarter interest of Gildersleeve was concerned, he would have to fight for it alone.

R. W. WEBB.

Subscribed and sworn to before me this 8th day of July, 188–.

[SEAL.] R. M. JOHNSON, *Clerk.*

EXHIBIT.

SANTA FÉ, N. M., *July 30th*, 1886.

I do hereby certify that a certain contract or instrument in writing made by Elias Brevoort in favor of C. H. Gildersleeve and John H. Knaebel, was filed for record in this office Sept. 3d, 1885, at 5 o'clock p. m. and was recorded the 22d day of June, 1886.

[SEAL.] JOHN GRAY,
Clerk and Recorder,
Per MARCELINO GARCIA, *D. C.*

And afterwards, to wit: on the 9th day of July, 1886, said defendant, The New Mexico Mining Company, by its solicitors, filed in said clerk's office, its motion to vacate the order allowing Charles H. Gildersleeve to intervene herein, and an affidavit in support thereof, which motion and affidavit are in the words and figures following, to wit:

147 In the District Court, First Judicial District, Santa Fé County.

EDWARD T. FARISH *et al.*
vs.
THE NEW MEXICO MINING COMPANY *et al.*

Now comes the defendant, the said New Mexico Mining Company, by its solicitors, Henry L. Waldo and William Breeden, and upon the affidavit of Alfred J. Wolf, herewith filed, moves the court to vacate the order heretofore, to wit: July 2d, 1886, entered in vacation, granting leave to C. H. Gildersleeve to interpose and file his petition of intervention in the above-entitled cause and to have his rights preserved, adjudicated and determined in the said cause to the same extent as though he had originally been made a party to said cause.

HENRY L. WALDO,
WILLIAM BREEDEN,
Solicitors for the New Mexico Mining Company.

Affidavit in Support of Motion.

TERRITORY OF NEW MEXICO, *County of Santa Fé,* } ss:

In the District Court, First Judicial District.

EDWARD T. FARISH *et al.*
vs.
THE NEW MEXICO MINING COMPANY *et al.* } Chancery.

COUNTY OF SANTA FÉ, *Territory of New Mexico.* }

Alfred J. Wolf, having been first duly sworn, deposes and says: That for many years past, until last May, he has been president of the New Mexico Mining Company; that he is now a director in said company and resides in the city of Santa Fé; that he is the fully empowered and accredited agent of the said company for the Territory of New Mexico; that he alone is authorized to
148 transact all business connected with said company in said Territory; that ever since he arrived in the city of Santa Fé in January, 1886, he has attended to and managed the affairs of said company; that he has absolute and exclusive control of all matters, legal and otherwise, connected with said company, and the power to bring suit, defend the same, or if he deems it best, to effect a compromise of any matters in litigation; that in pursuance of the powers so conferred upon him, he entered into an agreement on behalf of said company with Elias Brevoort, the complainant in the cross-bill heretofore filed in the above-entitled cause, by his solicitors, Gildersleeve and Knaebel; that in consequence of said agreement, said Brevoort dismissed his said suit; that he is informed that since said dismissal, an order has been made in said cause permitting one C. H. Gildersleeve to file a petition of intervention in said cause, setting out all claim of interest in the property of litigation; that the same, and all his rights therein shall be preserved, adjudicated and determined to the same effect and extent as though he had been made a party to said suit in the first instance, and that a stipulation consenting to the intervention of the said C. H. Gildersleeve has been signed by some of the attorneys of said company.

Affiant further says that no one had or has the power to consent to such a proceeding but himself as agent of said company; that said stipulation was made without asking or obtaining his consent or authority, and that had he been asked, he would have positively refused to give such consent, and now withholds the same, and that the entering into a stipulation was and is contrary to the wishes and purposes of the said The New Mexico Mining Company.

Further affiant saith not.

ALFRED J. WOLF.

149 Subscribed and sworn to before me this 8th day of July, A. D. 1886.

R. E. TWITCHELL,
[SEAL.] *Notary Public.*

And afterwards, to wit: on the 23d day of the regular July, 1886, term of said district court, the same being July 30th, 1886, the following among other proceedings were had, to wit:

EDWARD T. FARISH *et al.*
vs.
THE NEW MEXICO MINING COMPANY *et al.* } 1490. Chancery.

This cause again coming on to be heard upon the motion of said defendants, The New Mexico Mining Company, to vacate and set oside the order allowing C. H. Gildersleeve to intervene herein, is again argued by counsel for said defendant, H. L. Waldo, Esq., and by E. A. Fiske and Thos. Smith, Esqs., for C. H. Gildersleeve and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit: on the 15th day of December, 1886, an order was made and entered of record in said cause by said court, in vacation, which said order is in the words and figures following, to wit:

In the District Court for the First Judicial Distridt in and for the County of Santa Fé, Territory of New Mexico.

EDWARD T. FARISH *et al.*
vs.
THE NEW MEXICO MINING COMPANY *et al.* } 1490. Chancery.

This cause now on this 15th day of December, A. D. 1886,
150 coming on for hearing at chambers, before the judge of said court, upon the motion heretofore made herein, to wit: on the 9th day of July, 1886, by the New Mexico Mining Company, to vacate and set aside the order made in this cause on July 2d, 1886, granting leave to said C. H. Gildersleeve to interpose and file his intervening petition and to have his rights preserved, adjudicated and determined "in said cause to the same extents as though he had originally been made a party to said cause;" the said motion having been argued by H. L. Waldo and William Breeden on behalf of said New Mexico Mining Company and by Messrs. Fisk and Warren and Thomas Smith, Esqs., on behalf of said Gildersleeve, the complainants herein making no objection to said order, and the said judge being sufficiently advised upon said motion, does now overrule the same, and declines to set aside and vacate said order and the entry thereof.

And the petition of Charles H. Gildersleeve filed in this cause on July 8th, A. D. 1886, wherein he states and sets forth that the cross-

bill filed in this cause, but as a matter of convenience docketed as a separate proceeding and numbered 1865, by Elias Brevoort, against the complainants in this cause, and all the defendants herein other than said Brevoort, was in truth and in fact filed for the use of the said Brevoort, John H. Knaebel and said Charles H. Gildersleeve, they being the owners as tenants in common of the lands described therein, praying that the dismissal of said cross-bill filed by said Brevoort be not entered or allowed to prejudice the rights of said Gildersleeve, and that he be allowed to become a party to said cross-bill and prosecute the same for his own use and benefit, now coming on for hearing, and the same having been submitted upon the sworn petition of said Gildersleeve and the affidavits appertaining to the same and after
151 argument by the counsel aforesaid, the court, being sufficiently advised, finds that said cross-bill and all other pleading filed in the name of the said Elias Brevoort in the above-entitled cause were filed for and on behalf of the joint interest and benefit of the said Brevoort, Gildersleeve and Knaebel, and it is now ordered that the motion and petition of said Charles H. Gildersleeve be granted, and that he be and is hereby made a party complainant to said cross-bill, and is given leave to amend the same adding thereto such averments as he may deem necessary to show that he did, at the time said cross-bill was filed, own the interest in the property therein described, stated and shown in *in* his said petition, for leave to become a party to said cross-bill, and such other formal averments as may be proper and necessary to protect his alleged interest. It is further ordered that said cross-bill shall be so amended by rewriting the same with such averments as are herein allowed added thereto, so as to preserve of record the said cross-bill as it now is, and as it shall appear as amended on the leave now granted, which amended cross-bill shall be filed by or on the 22d day of December, 1886, a copy thereof to be served upon the said defendants thereto, or their solicitors as required by the rules of this court.

It is further ordered, considered and adjudged that the dismissal of said — Brevoort heretofore filed shall be deemed, held and considered to be only a dismissal thereof as to the one-half interest in the property described in said cross-bill owned by said Brevoort, and that said cross-bill is not dismissed as to the one-fourth interest in said property claimed by Charles H. Gildersleeve, but as to such interest, said cross-bill be held as prosecuted for and on behalf of said Gildersleeve and to that extent that said cross-bill is not
152 dismissed, and that as to such one-fourth interest in said property, the said Charles H. Gildersleeve may prosecute, in his own name, such cross-bill with the same rights as if he had originally when filed been made a party thereto by name.

It is further ordered that all pleadings and exhibits filed in this cause, based upon the cross-bill or the issues growing out of the same, shall inure to the use and benefit of said Gildersleeve in so far as the same may be necessary in order to protect any of his rights or interests therein or in the property in controversy in this action,

to the same extent as the same have, or might have, inured to the use and benefit of said Brevoort.

It is directed that the order now herein made shall by the clerk be entered in the journal as of said cause No. 1490, and shall be taken as an order also in the proceedings numbered 1865; this 15th day of December, 1886.

ELISHA V. LONG,
Chief Justice, etc.

And afterwards, to wit: on the 21st day of December, 1886, said Gildersleeve, by his solicitors, filed in said clerk's office his answer to said bill of complaint of Farish *et al.* which is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, } *ss:*
County of Santa Fé, }

First Judicial District Court.

EDWARD T. FARISH *et al.*
vs.
THE NEW MEXICO MINING COMPANY *et al.* } Chancery.

The separate answer of Charles H. Gildersleeve to the bill of complaint of Edward T. Farish, Benjamin M. Reed, Larkin G. Reed, Alexander Reed, Modesta Ortiz, Teodora Ortiz de Martinez, and Francisco Ortiz, complainants in the above-entitled cause.

153 This defendant now and at all times saving and reserving to himself all manner of benefit or advantage that may be taken to the many errors, uncertainties and imperfections in the complainants' bill of complaint contained, for answer thereto, or to so much thereof as this defendant is advised is material or necessary for him to answer to, answer and says:

That he admits that in the year 1833, Jose Francisco Ortiz and Ignacio Cano (now both deceased), registered in the office of Francisco Baca y Ortiz, a mineral vein of gold-bearing rock and petitioned that the same be granted to them, and also further petitioned for the privileges of water supplies and pasturage, all of which was duly granted them at the time and in the manner and to the extent as stated in the said bill of complaint.

And thereupon they and their heirs became vested with the ownership and all the rights, titles and interest in and to the said mine and lands adjacent thereto, and that under the laws of Mexico then in force, and the treaty of Guadalupe Hidalgo, they became entitled to a confirmation of said grant as stated in said bill of complaint. This defendant also admits that at the time said grant was originally made by the authorities of the Mexican government, that Jose Francisco Ortiz and Ignacio Cano were tenants in common, and each the owner of an undivided one-half part of said grant; but denies that said Cano died seized and possessed of any portion of

said grant, or that Ortiz, after such death, continued to hold possession of said mine and lands connected therewith for the use of himself and all the heirs-at-law of said Ignacio Cano, and this defendant here states the fact to be that previous to the death of said Cano, about the year 1834, the exact date of which this defendant is at present unable to state, for a good,
154 sufficient and valid consideration, — sold, transferred and conveyed to said Jose Francisco Ortiz, all his right, title and interest in and to said mine, lands and grant, and every part thereof, formally delivering possession thereof in person as was the univer-al custom in vogue in New Mexico; that Jose Francisco Ortiz then entered into the exclusive possession of said mine, lands and grant, worked, used, occupied and enjoyed the same till the time of his death in the year 1848; that since that time the heirs of said Jose Francisco Ortiz, and this defendant and his assignors and trustees and parties for his use and benefit, have been in the whole, entire and exclusive possession of said mines, lands and premises. This defendant is not advised as to whether said Ignacio Cano left any children or heirs-at-law, or whether he died intestate, or whether the parties named in said bill were or are his children and were married in the manner and at the time stated in said bill of complaint; hence this defendant neither admits nor denies the statements in said bill of complaint with reference thereto.

This defendant further shows that in the year 1848, the said Jose Francisco Ortiz died intestate in the said county and Territory, leaving no direct heir or heirs, either ascendant or descendant, and that his only heirs-at-law left him surv-ing were an only sister named Maria de la Luz Ortiz and the children of his only brother, Ignacio Ortiz, then deceased. And this defendant further shows that said Ignacio Ortiz, brother of the said Francisco Ortiz, died intestate, prior to the death of the said Jose Francisco Ortiz, but in what year this defendant is not informed and therefore cannot state; that the said Ignacio Ortiz left him surviving as his only heirs-at-law, six children, namely: Abram, Estefana,
155 Ramona, Esmerejilda, Prudencia and Macedonia, and that all of the above-named heirs of the said Jose Francisco Ortiz, children of the said Ignacio, excepting the said Abram Ortiz, long before the filing of said bill of complaint, by divers deeds of conveyance by them respectively duly made, executed, acknowledged and delivered to said Elias Brevoort, for valuable consideration from him to them moving, duly granted, bargained, sold and conveyed to said Brevoort and his heirs, all their several estates, rights, titles, interests and claims in and to the said mine of Santa Rosalia, and the said privileges, premises and lands so as aforesaid granted in connection therewith, in virtue of descent from the said Ignacio Ortiz as aforesaid.

And your defendant further shows that the said Maria de la Luz Ortiz intermarried with one Manuel Sanchez, and thereafter, to wit: in the year 1880, died intestate, leaving her surviving as her only heirs-at-law, five children of her said marriage, namely: Esmerejildo, Domingo, Ignacio, Herenio and Rosina; that the said Rosina

intermarried with one Rafael Romero, and she and her said husband thereafter died intestate, but at what particular time your defendant is not informed and is unable to state, leaving as the only issue of the said marriage and as the only heir-at-law of the said Rosina, an only daughter named Josefa Romero, who thereafter intermarried with one Jesus Garcia.

And your defendant further shows that all of the above-named heirs of the said Francisco Ortiz, descendants of his said sister, Maria de la Luz, namely: the said Esmerejildo, Domingo, Ignacio, Hereneo and Josefa, long before this action, by deverse deed- of conveyance by them respectively duly made, executed, acknowledged and delivered to the said Elias Brevoort, for valuable con-
156 siderations from him to them moving, duly granted, bargained, sold and conveyed to the said Elias Brevoort and his heirs, all their estates, rights, titles, interests and claims in and to the said mine of Santa Rosalia and the said privile*d*ges, premises and lands so as aforesaid granted in connection therewith, in virtue of descent from the said Maria de la Luz, sister as aforesaid of the said Jose Francisco Ortiz.

And your defendant further shows that the terms and particulars of the said several conveyances to said Brevoort will more fully appear by reference to the said several deeds of conveyance so made and delivered to him, which said several deeds of conveyance your defendants begs leave to produce before your honor, and copies of which said several deeds are filed with his answer as part thereof.

And your defendant further shows, on information and belief, that the said Abram Ortiz departed from said Territory more than twenty years since, leaving behind him in said Territory his wife and leaving no issue; and that the said Abram Ortiz has not been heard from *from* upwards of twenty years last past, and that prior to the execution and delivery of the deeds last mentioned, he died intestate without direct heirs, ascendant or descendant, him surviving, long before the commencement of this action.

And your defendant further shows that afterwards, to wit: on or about the 1st day of July, 1880, said Elias Brevoort, by his good and sufficient deed of conveyance made, executed and acknowledged by him, granted, bargained, sold and conveyed to your defendant and John H. Knaebel, as tenants in common, the undivided one-half of all of said property, which deed and conveyance was filed and deposited in the office of the probate clerk and recorder of Santa Fé county, Territory of New Mexico, for record on or about
157 the 3d day of September, 1885, which will more fully appear by reference to said deed, a copy of which is here*in* filed and hereof made a part, and your orator asks leave to produce the same before your honor.

This defendant denies that Jose Francisco Ortiz died testate leaving his widow all or any of his right, title and interest in and to said mine, land and grant, or that he ever made any will whatever in favor of his wife, and also denies that the estate or the heirs and legal representatives of Jose Francisco Ortiz is in any manner limited to an undivided one-half of said grant and premises.

This defendant admits that in conformity with an act of Congress, said grant was duly investigated, considered and determined by the surveyor general of New Mexico, as stated in said bill of complaint; defendant further admits that pursuant to the treaty of Guadalupe Hidalgo, said grant was confirmed and said estate enlarged by act of Congress, as stated in said bill of complaint.

Defendant also admits that the New Mexico Mining Company made the false and fraudulent representations to the Commissioner of the General Land Office, the Secretary of the Interior and Ulysses S. Grant, President of the United States, and thereby fraudulently procured the issuance of a patent, as stated in said bill of complaint.

This defendant admits that the New Mexico Mining Company received the said letters patent and the estate and property therein described and granted in trust, but denies that the same was in any manner or degree in trust for the use and benefit of the heirs-at-law of said Cano, or their assigns; but states that the same was received and now is and has been held in trust for the said Brevoort
158 and his grantees as the sole and only representative and grantee of the heirs of said Jose Francisco Ortiz, deceased, and for his and their use and trust and for no one else.

Defendant admits that not only as to half, but states that as to all of said estate and property, the New Mexico Mining Company never acquired or possessed any beneficial right, use, property, estate or interest, whether in said letters patent or under the same or in the land and property therein granted.

Defendant admits that the New Mexico Mining Company executed and delivered to Stephen B. Elkins the conveyance stated in said bill of complaint, and that said Elkins and his associates are now in possession of said grant.

And this defendant denies all and all manner of unlawful combination and confederacy with which he is by the said bill charged, without this, that there is any other matter, cause or thing in said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to his knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, prove and maintain, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

C. H. GILDERSLEEVE.

FISKE & WARREN,
THOS. SMITH,
GEO. C. PRESTON,
Solicitors for Def't.

And afterwards, to wit: on the twenty-second day of December, 1886, Charles H. Gildersleeve filed in said clerk's office his amended cross-bill in said cause, which is in the words and figures following, to wit:

159 TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

In the District Court for the First Judicial District of the Territory of New Mexico, Sitting in the County of Santa Fé, in said Territory, for the Trial of Causes Arising under the Laws of the Territory of New Mexico.

To the Honorable Elisha V. Long, chief justice of the supreme court of the Territory of New Mexico and judge of the first judicial district court thereof:

Your orator, Charles H. Gildersleeve, a resident of the city and county of Santa Fé, in said Territory of New Mexico, now comes and in accordance with an order of this honorable court, made in a certain action and suit in chancery, now pending in this court, wherein Edward T. Farish and others are complainants, and The New Mexico Mining Company and others are defendants, said cause being numbered 1490, presents and exhibits to the court this his amended cross-bill and he complains of the New Mexico Mining Company, a corporation duly incorporated, organized and established under the laws of said Territory, Stephen B. Elkins, resident of the State of New York, Jerome B. Chaffee, resident of the State of Colorado, Larz Anderson resident of the State of Ohio, L. M. Lawson, whose first name is to your orator unknown, resident of the city of New York, Edward T. Farish, resident of the city of St. Louis, in the State of Missouri, Benjamin M. Read, Larkin G. Read, Alexander Read, Modesto Ortiz, Teodora Ortiz de Martinez, and Francito Ortiz her husband, of the Territory of New Mexico, Nestor Sandoval and Marcus Ramirez, of the State of Colorado, Louis Ortiz and Juan Ortiz of the Territory of New Mexico, and complainant show- unto your
160 honor that said Edward T. Farish, Benjamin M. Read, Larkin G. Read, Alexander Read, Modesto Ortiz, Teodora Ortiz de Martinez, and Francito Ortiz, her husband, part of the defendants named herein, on or about the 29th day of January, A. D. 1883, filed their bills of complaint in this honorable court, against Elias Brevoort, the said New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee, R. W. Donnell, Larz Anderson, Nestor Sandoval, Marcus Ramirez, Louis Ortiz and Juan Ortiz, thereby p-aying, among other things, that the defendants named in said bill of complaint might to the *be* best of their knowledge, remembrance, information and belief, but not under oath, full, true, direct and perfect answer make to all and singular the matters in said bill of complaint contained, and that it might be decreed by the court that said complainants are intitled to the undivided interest in the lands and patent set forth in said bill of complaint, and hereinafter more fully described, and that they be let into the possession and enjoyment of said interests, and that such of the defendants therein named as might be found clothed with the legal title to said lands, be declared and decreed to be trustees for said complainants to the extent of their equitable rights and interests, and be required to execute good and sufficient deeds with proper warranties to said

complainants, conveying to them all their said rights and interests and also to account to them for their proper shares of all the rents, issues and profits derived by the defendants or either of them from said lands; and further, if it should be made to appear to your honor that either of the said defendants had conveyed or incumbered said lands, or any part thereof, or any interest therein in such manner that it could not be recovered or reclaimed, that
161 such defendant might be decreed to account to said complainants therefor, and to pay to said complainants the full value of all such property, rights or interest lost to them by reason of such conveyance, or incumbrance; they also prayed for general relief and subpœna returnable at the next term of this honorable court, and the said Elias Brevoort being served with process appeared and put in an answer to said bill of complaint, and your orator having also filed his answer to said bill on the 21st day of December, 1886, as by the said bill and other pleadings and proceedings in said cause now remaining filed as aforesaid in this honorable court, reference thereto being had, will more fully appear.

And your orator further shows that long prior to the filing of said bill of complainant and of the answer thereto by said Brevoort that said Elias Brevoort, John H. Knaebel and your orator were the sole owners as tenants in common of all the lands described in said complaint, and by an agreement made between said Brevoort, Knaebel and your orator, said Brevoort entered his appearance to said suit and filed his answer to said bill, under the express understanding, arrangement and agreement that such answer should be for the joint use and benefit of all said parties, namely, Brevoort, Knaebel and your orator, and that afterwards, to wit: on the 11th day of July, A. D. 1884, by a like agreement, understanding and arrangement, the said Brevoort filed in said suit his cross-bill, to which this bill is now an amendment for the joint use and benefit of said Brevoort, Knaebel and your orator.

And your orator further shows that since the filing of said cross-bill, to wit: on or about the 18th day of June A. D. 1886, the said Brevoort and Knaebel conveyed to the said New Mexico Mining Company, or to some other person or persons to your orator
162 unknown, all their interest in and to the property in said cross-bill described.

Your orator further shows that by an order and decree entered in this cause on the 15th day of December A. D. 1886, made upon the petition of your orator, it was directed that your orator should have leave to prosecute said cross-bill in his own name, for his own use and benefit, and that he have leave to amend the same so as to show his right, interest and claims in the property therein described.

Your orator now comes and as and for his amended cross-bill herein against the defendants hereinbefore named, shows unto your honor that prior to the acquisition of New Mexico by the United States, and prior to the making of the treaty of Guadalupe Hidalgo by and between the United States and the Republic of Mexico, Jose Francisco Ortiz and Ignacio Cano, two citizens of the Republic of

Mexico, had acquired by grant from the said Republic of Mexico, certain mining lands, privileges and premises, situated in the department or Territory of New Mexico, and now being within the limits of the county of Santa Fé in the present Territory of New Mexico and known and designated as the Ortiz Mine grant; the same consisting of a certain gold mine formerly known as the mine of Santa Rosalia, and now known as the Ortiz mine, together with four square leagues of land including the said mine, the said four square leagues of land being bounded on the north by a line drawn one league due east and one league due west from a point distant one league due north from the center of the orifice of the said mine; on the south by a line drawn one league due east and one league due west, from a point distant one league due south from the
163 center of the said orifice; on the east by a line drawn one league due north and one league due south, from a point distant one league due east from the center of the said orifice; and on the west, by a line drawn one league due north and one league due south from a point distant one league due west from the center of said orifice.

And your orator further shows that after the said acquistion aforesaid, of the said mining land and premises, and prior to the inception of the hostilities between the United States and the Republic of Mexico, which resulted in the cession of New Mexico, to the United States, but at what particular time your orator is unable to estate, said Ignacio Cano transferred and conveyed all and singular his estate, right, title, interest and claim of, in and to the said mining land and premises to the said Jose Francisco Ortiz, for valuable consideration, and thereupon put the said Jose Francisco Ortiz into actual, exclusive possession of all and singular said mining lands and premises; whereupon said Jose Francisco Ortiz became and was the actual, sole and exclusive owner and possessor of the same and so continued to be up to and at the time of his death, claiming the same solely and exclusively and in his own right.

And your orator further shows that in the year 1848, at the city and county of Santa Fé, in the Territory of New Mexico, said Jose Francisco Ortiz, died intestate, seized and possessed of all and singular the said mining lands and premises, leaving him surviving his widow, —— ——, but leaving no direct heirs, either descendent or ascendant.

And your orator further shows that the said Francisco Ortiz at the time of his death left him surviving as his only heirs-at-
164 law, an only sister, named Maria de la Luz Ortiz, and the children of his only brother, Ignacio Ortiz, deceased.

An- your orator further shows that the said Ignacio Ortiz, brother of the said Jose Francisco Ortiz, died intestate prior to the death of the said Jose Francisco Ortiz, but in what year or at what place, your orator is not informed, and therefore cannot state; and that the said Ignacio Ortiz left him surviving as his only heirs-at-law, his six children, born in lawful wedlock, namely Abram, Estifana, Ramon, Fsmeregildo, Prudencia and Macedonia, and that

all of the above-named heirs of the said Jose Francisco Ortiz, children of his brother, Ignacio, excepting the said Abram Ortiz, long before the commencement of this suit, by divers deeds of conveyance, by them respectively duly made, executed, acknowledged and delivered, to said Elias Brevoort, for valuable considerations, from him to them respectively moving, duly granted, bargained, sold and conveyed to said Brevoort, to his use and the use of his heirs and assigns, all their several estates, rights, titles, interests and claims, of, in and to all and singular the said mining land and p-emises which had to them descended as heirs-at-law of the said Jose Francisco Ortiz, or otherwise.

And your orator further shows that the said Maria de la Luz Ortiz intermarried with one Manuel Sanchez, and thereafter to wit: in the year 1860, died intestate, leaving her surviving as her only heirs-at-law, five children of her said marriage, namely, Esmeregildo, Domingo, Ignacio, Herenio, and Rosaria; that the said Rosaria intermarried with one Rafael Romero, and she and her said husband thereafter died intestate, but at what particular time your orator is not informed and cannot state, leaving as the only issue of the said marriage and as the only heir-at-law of the said
165 Rosaria, her surviving and only daughter, named Josefa Romero, who thereafter intermarried with one Jesus Garcia.

And your orator further shows that all of the said descendants of the said Maria de la Luz Ortiz, sister of the said Jose Francisco Ortiz, namely, the said Esmeregildo, Domingo, Ignacio, Herenio and Josefa, long before the commencement of this suit, by divers deeds of conveyances by them respectively duly made, executed, acknowledged and delivered, to said Elias Brevoort, for valuable considerations from him to them respectively moving, duly granted, bargained, sold and conveyed to said Brevoort to the use of himself, his heirs and assigns, all their estates, rights, title, interests and claims, of, in and to all and singular said mining land and premises which had descended from said Jose Francisco Ortiz to the said Maria de la Luz, and through her to them, the grantors last aforesaid.

And your orator further shows that the terms and particulars of the said several conveyances to said Brevoort will more fully appear by reference to the said several deeds of conveyance so made and delivered to him, which said several deeds of conveyance your orator prays leave to produce befor- your honor, and copies of which said several deeds last mentioned are filed with this bill of complaint as a part thereof, and marked exhibits.

And your orator further states that afterwards, to wit, on July 1st, 1880, said Elias Brevoort so being the owner in fee-simple of the said grant and tract of land hereinbefore described with the appurtenances, for a valuable and sufficient consideration, granted, bargained, sold and conveyed to your orator and one John H. Knaebel, an undivided one-half part, share and interest of, in and to the same, and then made and executed, acknowledged and de-
166 livered a good and sufficient deed of conveyance, bearing said date, and then delivered the same to your orator and said Knaebel, and thereby the said Elias Brevoort, for a good, valuable

and sufficient consideration, granted, bargained, sold and conveyed to your orator and said John H. Knaebel, as equal tenants in common, an undivided moiety or one-half part, share and interest of, in and to all said premises, and tract of land with the appurtenances in fee-simple, and afterwards, to wit: On Septdmber 3d, 1885, the said deed was by your orator dully filed for record and recorded in the office of the recorder of said county of Santa Fé, and a copy thereof with the certificate of record is herewith filed, marked Exhibit I, and made a part of this bill.

And your orator avers and charges the fact to be that on and long prior to June 18th, 1886, and long prior to any conveyance or pretended conveyance by the said Brevoort to the said New Mexico Mining Company, or to any person or persons, other than to your orator and said Knaebel, of any interest in or to said tract of land, that the said New Mexico Mining Company well knew and had actual notice and knowledge that the said Brevoort had granted, bargained, sold and conveyed an undivided one-half interest in and to all said lands and property; and that the said New Mexico Mining Company long prior to the date last aforesaid — long prior to the conveyance by the said Brevoort to said New Mexico Mining Company as aforesaid, well knew and had actual knowledge that the said Brevoort had granted, bargained, sold and conveyed to your orator and said Knaebel, as tenants in common in *actual* parts, an undivided moiety, or one-half part thereof, in and to all said grant of land hereinbefore described and had so executed and delivered
167 to them the said deed of conveyance last hereinbefore mentioned.

And your orator further shows, upon his information and belief, that the said Abram Ortiz departed from the Territory of New Mexico upwards of twenty years ago, leaving behind him in the said Territory, his wife, whose name or particular place of residence, is unknown to your orator, and leaving no issue or other direct heir; that the said Abram Ortiz has not been heard from for upwards of twenty years last past; that prior to the execution and delivery of the said deeds to said Brevoort, as last mentioned, he died intestate, without direct heirs, ascendant or descendant him surviving, long before the commencement of this bill.

And your orator further shows that pursuant to and in conformity with a certain act of Congress of the United States of America, approved on the 22d day of July, in the year 1854, entitled "An act to establish the offices of surveyor general of New Mexico, and Nebraska; to grant donations to actual settlers therein, and for other purpose-;" the United States surveyor general in and for the Territory of New Mexico, investigated the matter of the aforesaid grant of the said mining land — premises, and examined, considered and determined upon the fact and validity of the said grant, and thereupon, to wit: on the 24th day of November, in the ye-r 1860, he duly made his report, pursuant to said act, which report bears date on the said day last mentioned, and therein and thereby he decided and determined the said grant to be authentic and valid and rec-

ommended the same to Congress aforesaid for confirmation, pursuant to the said treaty of Guadalupe Hidalgo.

And your orator further shows that after the making of
168 the said report by the said surveyor general, Congress aforesaid, pursuant to the said treaty of Guadalupe Hidalgo, and out of regard for the obligations thereof, and for the benefit and advantage of the heirs and assigns of the said original grantees, Jose Francisco Ortiz and Ignacio Cano, passed a certain other act, approved on the 1st day of March, in the year 1861, entitled, "An act to confirm a certain private land claim in the Territory of New Mexico," wherein and whereby the grant aforesaid and the said report thereon were recited and the said grant was referred to as private land No. 43, and wherein and whereby the said grant or private land claim was confirmed and wherein and whereby it was expressly declared that the said confirmation should only be construed as a quitclaim or relinquishment on the part of the United States and should not affect the adverse rights of any other person or persons whomsoever.

And your orator further shows that pursuant to the statute in such case made and provided and to the course in practice of the General Land Office of the United States aforesaid, the United States surveyor general, in and for said Territory, caused the said land and premises, to wit, the four square leagues aforesaid, to be surveyed and laid out by metes and bounds, and landmarks, and a map or plat thereof to be made, and thereupon he duly made return of the said survey and the filed-notes and data thereof, and of the said map or plat to the Commissioner of the said General Land Office and filed the same in the said General Land Office and that thereafter, to wit, in the year 1875, the said Commissioner duly approved the said survey, except as to the part hereinafter mentioned, and your orator further shows that according to the said return field-notes, survey and map or plat, the said land and prem-
169 ises, which is all situate in the county of Santa Fé, in said Territory of New Mexico, contains in superficial extent and area, sixty-nine thousand four hundred and fifty-eight and $\frac{33}{100}$ acres of land.

And your orator further shows that after the passage and promulgation of the said act of confirmation and after making and approval of the said survey of the examination by the Secretary of the Interior of the United States aforesaid, of a certain conflict hereinafter described existing between the said survey and that of a certain other Mexican land grant, known as the Cañon del Agua grant, the said defendant The New Mexico Mining Company, at and prior to the date of the letters patent hereinafter mentioned, as issued in its name as patentee, wrongfully, falsely and fraudulently represented to the United States aforesaid and to the Commissioner of the said General Land Office and to the Secretary of the Interior of the United States aforesaid, and to Ulysses S. Grant, then the President of the United States aforesaid, that the said defendant The New Mexico Mining Company had duly acquired by purchase from the legal representatives and assigns of the said Jose Francisco

Ortiz, all and singular the estate, right, title, interest and claim of which the said Jose Francisco Ortiz died seized and possessed as aforesaid of, in and to the said land premises hereinbefore first mentioned and that therefore, as a legal assign of the said original grantees, the said defendant The New Mexico Mining Company came within the scope and intent of the said act of confirmation, and of the grant therein contained and was entitled to be recognized by the United States aforesaid and all the lawful authorities thereof, as the sole and only assign of the said original grantees and as the sole lawful claimant for the said grant of land and as entitled to letters patent
170 therefor from the United States aforesaid, and thereupon — said false and fraudulent declarations, representations and suggestions, the said defendant The New Mexico Mining Company applied to the Commissioner of the said General Land Office and to the President of the United States aforesaid, for letters patent to be issued to the said defendant The New Mexico Mining Company, in its name for all and singular the said first-mentioned land and premises to wit, the said four square leagues.

And your orator further shows that notwithstanding the said grant to the said Jose Francisco Ortiz and Ignacio Cano and the said survey and act of confirmation, the United States aforesaid, by its lawful authorities had at the time of such application already issued to one Jose Serafin Ramirez, letters patent for a large tract of land known as the Cañon del Agua grant, which, as described in the letters patent last mentioned, embraced a certain piece or parcel of land, to wit, two hundred and fifty-nine acres or thereabouts of the same land and premises which had been surveyed as aforesaid as the land and premises granted as aforesaid to the said Jose Francisco Ortiz and Ignacio Cano, which said piece or parcel of two hundred and fifty-nine acres or thereabouts can be easily ascertained and definitely separated by inspection and comparison of the respective surveys and descriptions of the said two several grants; and that such proceedings were had in the said General Land Office before the Commissioner thereof and afterwards by appeal to and before the said Secretary of the Interior, to all which proceedings the said defendant The New Mexico Mining Company was a party. That upon the said examination of the said conflict of surveys, the said Secretary decided and determined that the said piece or parcel of land, to wit, the *the* said two hundred and fifty-nine acres
171 or thereabouts, should be deducted from the said first-mentioned survey and allowed to the owners of the said Cañon del Agua grant.

And your orator further shows that all and singular the aforesaid declarations, representations and suggestions of the said defendant The New Mexico Mining Company, were untrue, false and fraudulent and were *there* then and there known to the said defendant The New Mexico Mining Company so to be and yet that induced and misled thereby and believing the same to be true and with the intent to issue letters patent for the said first described land and premises, (except the piece or parcel aforesaid of about two hundred and fifty-nine acres,) to the legal representatives and assigns of the

said original grantees and not otherwise; the said Ulysses S. Grant, acting as President of the United States of America, issued and delivered in the name of the United States aforesaid to the said defendant The New Mexico Mining Company, certain letters patent under the seal of the General Land Office aforesaid, and under his official hand and bearing date the 20th day of May, in the year of our Lord, eighteen hundred and seventy-six, and of the Independance of the United States the one hundredth, and countersigned by the recorder of the General Land Office wherein and whereby the said examination, report and survey of the surveyor general respecting the said Mexican grant to the said Jose Francisco Ortiz, and Ignacio Cano, and the said act confirming the same and the said conflict of description respecting the said piece or parcel of two hundred and fifty-nine acres or thereabouts, were each and all recited, among other things, and wherein and whereby the said United States of America gave and vested or attempted to give and vest unto the said defendants The New Mexico Mining
172 Company and to its successors and assigns, the mere legal title in and to the said first above described land and premises, containing sixty-nine thousand, four hundred and fifty-eight and thirty-three one-hundredths acres; but excepting and reserving from the transfer by such letters patent, so much of the land embraced in the said hereinbefore first-mentioned land and premises as is included within the survey of the said Cañon del Agua grant, approved by the surveyor generrl of the Territory of New Mexico on the 16th day of October, in the year 1866, and patented to Jose Serafin Ramirez, his heirs and *asings* on the 1st day of July, in the year 1875; and estimated to contain about two hundred and fifty-nine acres, as aforesaid, and with the further express stipulation that in virtue of the aforesaid act of Congress approved the 1st day of March, in the year 1861, the confirmation of the said claim and the said patent, that is to say, the said Mexican grant to the said Jose Francisco Ortiz and Ignacio Cano, and the said patent therefor, should only be construed a quitclaim or relinquishment on the part of the United States aforesaid, and should not affect the adverse right of any other person or persons whomsoever; to have and to hold the said land and premises with appurtenances unto the said defendant The New Mexico Mining Company, and to its successors and assigns forever, with the exception, reservation and stipulation aforesaid.

And your orator further shows that thereafter by virtue and under color of the said letters patent the said defendant The New Mexico Mining Company, entered on, occupied, possessed and enjoyed a small part of said land and premises described in the said letters patent, as patentee thereunder, and remained and
173 continued in the same occupation, possession and enjoyment under color and claim of the said letters patent until the conveyance to the said defendants Stephen B. Elkins and Jerome B. Chaffee, hereinafter mentioned.

And your orator further shows upon his information and belief that at the time of the issuing of said letters patent to the said defend-

ant The New Mexico Mining Company as aforesaid, the said Brevoort was the only legal representative and assign of the said Jose Francisco Ortiz and Ignacio Cano, and of the said Mexican grant so made to them as aforesaid, and that he was so by force and virtue of the several deeds of conveyance so made to him as hereinbefore set forth, and that said Brevoort was therefore the only person to whom the said mentioned Mexican grant, to wit, the Ortiz Mine grant, and the said land and premises included therein were intended to be confirmed, assured and granted by the said last-mentioned act of Congress aforesaid, and was the only person at the date and issuing of the said letters patent entitled to receive and enjoy the same and the estate and property thereby intended to be granted and confirmed.

And your orator further shows that in all and singular the proceedings had by and before the said surveyor general touching the investigation, examination, consideration and determination of the said Mexican grant and the private land claim thereunder, the said defendant The New Mexico Mining Company appeared and falsely and fraudulently represented itself to be the only assign and representative of the said original grantees Jose Francisco Ortiz and Ignacio Cano, and of the said Mexican grant, and your orator further shows that it was only by force and by reason of such false and fraudulent representations that the said defendant The New
174 Mexico Mining Company was ever recognized by the said surveyor general as such assign or representative.

And your orator further shows that while the said proceedings were pending before the said surveyor general, preliminary to the said report and act of confirmation the said New Mexico Mining Company recognizing the authenticity and validity of the said Mexican grant and not claiming adversely hereto but pretending falsely and fraudulently to be the only assign and representative of the said original grantees and of the said grant, and claiming only as such assign and representative, entered upon and occupied certain parts of the said granted premises.

But your orator further shows that in all its said acts and doings, claims and representations before the said surveyor general as well as in so entering upon and occupying certain parts of the said granted premises, the said defendant The New Mexico Mining Company was in no manner or degree beneficially interested or entitled in or to the said land or premises, or any part thereof; but it was and it always thereafter remained merely a trustee by its own wrong and fraud aforesaid for the use and benefit of the lawful heirs and representative aforesaid of the said Francisco Ortiz.

And your orator further shows that by reason of the facts above set forth, the said defendant, The New Mexico Mining Company, received the said letters patent, only in trust for and to the use and benefit of said Brevoort and his assigns, and that the said defendant The New Mexico Mining Company never acquired or possessed or was ever entitled to any beneficial right, use property, estate or interest whatever in the said letters patent or thereunder, or in the land and property thereby granted.

175 Your orator further shows that thereafter, to wit, on the — day of January, in the year 18—, the said defendant, The New Mexico Mining Company, by a certain deed of conveyance by it executed under its corporate seal and acknowledged and delivered to the said defendants Stephen B. Elkins and Jerome B. Chaffee, purported and pretended to convey all and singular the said land and premises, so to it patented as aforesaid, to the said defendants Stephen B. Elkins and Jerome B. Chaffee, and that thereafter, as your orator is informed and believes, but at what particular time, or by what particular instrument, or other means, your orator is not informed, and therefore, cannot state. The said defendants Stephen B. Elkins and Jerome B. Chaffee purported or pretended to convey to the said defendant Larz Anderson and to divers other persons to your orator unknown, some share of estate, right, title, interests or claim, of, in or to the said land and premises, but your orator is not informed, and he has no means of ascertaining, and, therefore, he cannot state, at what particular time, or in what particular manner, or in what shares or quantities, or in what estates or tenancies such conveyance or conveyances by the said Stephen B. Elkins and Jerome B. Chaffee or either of them, were made; and your orator cannot therefore state particularly concerning the same.

And your orator further shows that upon receiving the said letters patent and claiming the said land and premises thereunder, it became and was the duty of the said defendant The New Mexico Mining Company as trustee as aforesaid of the said Brevoort not only to protect the said estate from waste and injury but also to protect the same as against injurious and illegal clouds on the title thereof; but your orator further shows that the said defend-

176 ant company, unmindful of its duty in the premises, permitted the said defendant, Stephen B. Elkins and others claiming title to a certain other land grant or private land claim known and officially designated as the "Mesita de Juana Lopez," the same being a grant of land situated wholly north of the Galisteo river in the said county of Santa Fé, to procure to be made falsely and fraudulently a survey of the said last-mentioned land grant by the surveyor general of the said Territory, by which the lands embraced in the said last-mentioned land grant are made to appear to extend upon and over the northwest part of the said Ortiz Mine grant so as to encroach upon and embrace twenty thousand acres more or less of the said Ortiz Mine grant and the lands and premises part of the said four square leagues, and also falsely and fraudulently and by means of falsely representing to the said surveyor general and the said Commissioner of the General Land Office, that the said false and fraudulent survey was true and correct and that the said land grant, the "Mesita de Juana Lopez," included the said area of twenty thousand acres, more or less, of the said Ortiz Mine grant, procured the said false and fraudulent survey of the land grant, the "Mesita de Juana Lopez," to be approved by the said surveyor general and Commissioner.

And your orator further shows that the said land grant, the Mesita de Juana Lopez, is a valid Spanish grant made by the Kingdom of

Spain long prior to the making of the said Ortiz Mine grant, and the Spanish grant has been duly confirmed by act of the Congress of the United States, wherefore and by means of the premises the said survey of the said Spanish land grant is, (the same being valid on its face and without proof of the said false representation and fraudulent survey), a cloud on the title of the said Ortiz Mine grant.

177 And your orator further shows that the said The New Mexico Mining Company, before it accepted the said letters patent and the said other defendants, before they or either of them accepted any conveyance or instrument of transfer of or concerning the said Ortiz Mine grant or any of the land or premises embraced therein, had full notice of the said rights by inheritance of the said heirs-at-law of the said Jose Francisco Ortiz in and to the same and of the said several conveyances to the said Brevoort, vesting in him the sole equitable title in and to the said Ortiz Mine grant and the said land and premises and of the said wrong and fraud and of the said trust.

And your orator further shows that the said defendant, the said The New Mexico Mining Company, has yielded the said occupation and possession of the said letters patent, to the said defendants Stephen B. Elkins and Jerome B. Chaffee, and they the said two defendants last named, in their own behalf and in behalf of the said defendant Lars Anderson and others unknown to your orator, their associates are now in the occupation, possession and enjoyment of a small part of the said Ortiz Mine grant, except so much thereof as is included in the said false and fraudulent survey of the said Mesita de Juana Lopez land grant; and as to the part last mentioned, said defendant Stephen B. Elkins is in participation with Thomas B. Catron and others to your orator unknown, claimants of the said Mesita de Juana Lopez grant, in occupation, possession and enjoyment of the same, and the said defendants, according to the respective possessions aforesaid, are and for several years last past have been in receipt of all the rents, issues and profits of the premises by them so respectively possessed, appropriating the same to their own use, to the exclusion of said Brevoort and

178 his assigns and without his or their consent and against his — their objections and protests.

And your orator further shows that the said land and premises embraced within the said four square leagues contains much valuable growing timber and also many valuable mines and mineral beds of gold, silver, copper, lead, and coal, and that the same are of great value, to wit: of the value of five millions of dollars and upwards; and that the said defendants Stephen B. Elkins, Jerome B. Chaffee and Lars Anderson and their associates and confederates, to your orator unknow-, are making preparation to cut and appropriate the said timber and open and operate the said mines and mineral beds, and to convert the minerals and other products of the said land and premises to their own use and they t-reaten to commit waste on the said land and premises and to convert the said timber and the said minerals and other products thereof to

their own use without the consent and against the protest and objection of your orator.

And your orator further shows that the said defendants, except the said defendant company, threaten to sell and convey the said land and premises and to convert the purchase-money to their own use.

And your orator further shows that the said tract of twenty thousand acres more or less affected by the said false and fraudulent extention of the survey of the Mesita de Juana Lopez land grant, embraces the most valuable coal lands of the said Ortiz Mine grant and that the said tract so affected contains inexhaustible and extremely valuable beds of both anthracite and bituminous coal.

And your orator further shows that the said defendants Edward T. Farish, Benjamin M. Read, Larkin G. Read, Alexander Read, Modesto Ortiz, Teodora Ortiz de Martinez, and Francisco
179 Ortiz, her husband, claiming to be heirs and assigns of the said Ignacio Cano, ignore the said conveyances so made as aforesaid by the said Ignacio Cano in his lifetime, (he being now deceased), to the said Jose Francisco Ortiz of all the estate, right, title, interest and claim of the said Ignacio Cano as original grantee aforesaid, in and to the said Ortiz Mine grant and the said land and premises embraced therein, and now unlawfully set up and pretend that the said Ignacio Cano never at any time made such conveyance, and never at any time transferred his interest in the said Ortiz Mine grant, land and premises to the said Jose Francisco Ortiz, and further unlawfully set up and pretend that as to one undivided half part of the said Ortiz Mine grant, land — premises, your orator is not beneficially *or* owner thereof.

And your orator hoped that the said defendant, The New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee, and Lars Anderson, and their unknown associates, having notice and knowledge as aforesaid of the said trust so existing as aforesaid, in behalf of said Brevoort and your orator, and of their equitable right to the said letters patent so as aforesaid issued to the said defendant The New Mexico Mining Company and to the said land and premises therein described and thereby granted, would before this have recognized and acknowledged your orator's right in the premises, and yielded to him the possession and enjoyment of the said last-mentioned land and premises, and delivered and surrendered to him the said letters patent and by proper deeds of conveyance assured to him the full legal and equitable title to the said land and premises; and also that the said other defendants, pretended heirs and assigns of the said Ignacio Cano would have recognized your orator's said right in the premises and relinquished their said
180 adverse claims to said premises as in justice and equity the said defendants respectively ought long since to have done.

But now so it is, may it please your honor, that the said defendants combining and confederating together and with divers persons at present unknown to your orator, whose names when discovered your orator prays he may be at liberty to insert herein, with apt words to charge them as parties defendant hereto, and con-

triving how to wrong and injure your orator in the premises, they, the said defendants, absolutely refuse to do equity to your orator in the premises or to comply with his repeated requests in that behalf and they at times pretend that your orator is not the assign of all or any portion of the estate, right, title, interest and claim whereof the said Jose Francisco Ortiz died seized and possessed of, in and to the said Ortiz Mine grant, and the said land and premises embraced therein, and they except the said pretended heirs and assigns of the said Ignacio Cano, at all times pretend that one Maraquita Montoya, now deceased, the widow of the said Jose Francisco Ortiz, deceased, inherited the said land grant and premises from the said Jose Francisco Ortiz deceased and thereafter she conveyed the same to one John Greiner, and that thereafter the said John Greiner conveyed the same to Abraham Rencher, Elisha Whittlesey, Ferdinand W. Risque, Andrew J. O'Bannan, C. E. Sherman, N. M. Miller and Thomas J. Walker, and that thereafter the said last-named persons conveyed the same to the said defendant, The New Mexico Mining Company, prior to the alleged conveyance thereof by the said defendant The New Mexico Mining Company, to the said defendants Stephen B. Elkins, and Jerome B. Chaffee, as aforesaid; and at all times the said defendants, except the said preten-ed heirs and assigns of the said Ignacio Cano, pretend that before
181 the said alleged conveyance by the said Maraquita Montoya, she had acquired the said Ortiz Mine grant, land and premises by means of a pretended will or testamentary writing or other instrument alleged to have been executed by the said Jose Francisco Ortiz, in his lifetime; and they (except as aforesaid,) at times pretend that the said act of confirmation and the said letters patent were not intended for the benefit of the legal representatives and assigns of the said original grantees of the said grant, land and premises last aforesaid, but that the same were intended for the use and benefit of the said defendant, The New Mexico Mining Company, and its assigns, and they, (except as aforesaid) also at times pretend that the said last-mentioned assigns are the lawful and equitable holders and owners of the said timber and the said minerals and other products and of all the rents, issues and profits of the said last-mentioned land and premises, and as such are entitled to appropriate and enjoy the same to their own use and to the total exclusion of your orator therefrom, and they the said other defendants, pretended heirs and assigns of the said Ignacio Cano also pretend that they are equitably and beneficially entitled to the said Ortiz Mine grant, land and premises and to the said letters patent, to the extent of one undivided half part, share or interest therein, to the exclusion of your orator from such one undivided half part.

Whereas your orator charge- the contrary thereof to — the truth, and that he is the legal representative and assign of the said original grantees Jose Francisco Ortiz and Ignacio Cano respectively to the undivided one-fourth part of the said Mexican grant, so made to them, and as such is entitled to the exclusive benefit and ad-
182 vantage of the said act of confirmation and letters patent last mentioned to the extent of his interests as aforesaid, all which

actions, doings and pretenses of the said defendants are contrary to equity and good cons-ience and tend to the manifest wrong, injury and oppression of your orator in the premises.

In tender consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law and is relievable only in a court of equity, where matters of this nature are properly cognizable, and relievable.

To the end therefore that the said defendants and their confederates, when discovered, may, (without oath, an answer under oath being hereby expressly waived), to the best and utmost of their respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they and every of them distinctly interrogated thereto, and that to save and protect the said Ortiz Mine grant and the said land and premises embraced therein and the said letters patent therefor, and the timber growing thereon, and the mines and mineral beds of gold and coal and *and* other metals and minerals therein contained, and to prevent loss and waste thereon, pending this action, and to bring and prosecute proper actions at law and suits in equity in the premises, and especially to bring and prosecute a suit in equity to remove from *from* the title of the said Ortiz Mine grant, with the said land and premises embraced therein, the said cloud created and existing by reason of the said false and fraudulent extension of the said survey of the said Mesita de Juana Lopez land grant, one or more receivers may be appointed by your honor of all and singular the said Ortiz Mine
183 grant and the said land and premises embraced therein, with the appurtenances, and of the said letters patent therefor; and that the said defendants and each and all of them, may be compelled by the order of this honorable court, forthwith to deliver actual possession and custody of the said last-mentioned land and premises and letters patent to the said receiver or receivers, and that the said defendants and each and all of them may be restrained, by the order and injunction of this honorable court from cutting down any timber or other trees, on the said last-mentioned land and promises, and from opening or operating any mines thereon, and from raising, producing or removing any gold, silver, copper, lead, iron, coal or other ore, metal or mineral therefrom, and from committing any other waste thereon, and from collecting, receiving or appropriating any of the rents, issues, profits or income of the said properey last mentioned, and from actively or passively granting, bargaining, selling, assigning, traufe-ring, mortgaging, encumbering, injuring, or intermed-ling with the said last-described property or any part thereof, and from defacing, injuring, concealing, endangering, or transfer-ing or otherwise despoiling or interfering with the said letters patent, so as aforesaid issued to the said defendant, The New Mexico Mining Company, and that the said defendants may fully answer the premises, and that it may be declared and decreed by this honorable court that your orator is lawfully entitled in his own right to all and singular

the undivided one-fourth part of the said Ortiz Mine grant, land and premises, to wit, the said sixty-nine thousand four hundred and fifty-eight and thirty-three one-hundredths acres of lands, subject to the exception, reservation and stipulation contained in the said letters patent, issued to the said defendant
184 The New Mexico Mining Company, bearing date the 20th day of May, in the year 1876, and further that your orator is entitled to share jointly the possession of the said letters patent and the occupation and possession and enjoyment of the patented lands and premises therein described; together with other parties that may be therein interested and further that the said defendant, The New Mexico Mining Company received the said letters patent in trust for the sole use and benefit of your orator or any other assigns, heirs or legal representatives of the said original grantees, and further, the said several conveyances of the said last-mentioned patented land and premises made by the defendant, The New Mexico Mining Company, and Stephen B. Elkins and Jerome B. Chaffee, and all other conveyances made by the defendants or any or either of them or the said land and premises last mentioned or any part thereof were made subject to the trust aforesaid, and further that none of the defendants to this action have or has any beneficial or equitable estate, right, title, interest or claim, of, into or upon the said land and premises last described, or any part thereof, that is herein claimed by your orator, or the appurtenances thereof, or the timber, gold, silver, copper, lead, coal, or other product thereof, or the rents, issues, profits or income thereof, and further that none of the said defendants is a purchaser in good faith and without notice of the said last-mentioned land premises, or any part thereof, or any interest therein; and further that the said defendants, The New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee and Larz Anderson, and their associates and confederates are trustees, and each of them is a trustee of the said last-mentioned land and premises and of the title thereto, to the use and for the benefit of your orator; and that by the decree of this honorable
185 court, said defendants and each of them may be compelled to acknowledge the rights and interests of your orator in said letters patent and that they and each of them may be compelled to execute, acknowledge and deliver to your orator proper deeds of conveyance in due form of law, to convey and release the said land and premises last mentioned, or the undivided fourth part thereof, with the appurtenances to your orator, and in and by such deeds, to covenant against the acts and sufferances of the said defendants respectively, in respect to the said premises, and to convenant for further assurance of the title thereof to your orator and his heirs and assigns and that your orator may have such further and other relief as to this honorable court shall seem just, equitable and proper in the premises; and that the said defendants may be required to pay the costs of this action and expenses of the said receivership, and that your orator may have the damages by him sustained, by reason of the grievances aforesaid, to wit, one million of dollars; and that for the purpose of ascertaining the said damages an ac-

counting may be had by and between the several parties to this suit, of and concerning their acts and doings in and about the said last-described property, and that if by reason of any facts not known to your orator and not within his information, and therefore not alleged in this bill, it shall appear to this honorable court that the said last-described land and premises, or any part thereof, have been or has been divested from your orator in contravention of the said trust by the said defendants or any of them, so that this court cannot administer equity in the premises by compelling the actual conveyance thereof in possession, to your orator, and cannot afford adequate and complete relief to your orator, in the premises, then that as against the said defendant *of* defendants so offending your orator may have judgment for his damages in that behalf suffered,
186 whatever the same may be, to this honorable court proved to be; and also, if no cause to the contrary sufficiently appear, that by force and direction of the decree of this honorable court, your orator may be put into free, full and peaceable possession of all and singular his portion of the said land and premises last described, and of a like portion of all mines and mineral beds and deposits therein contained, and of all the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

May it please your honor to grant unto your orator the writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the said New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee, Lars Anderson, L. M. Lawson, Benjamin M. Read, Larkin G. Read, Alexander Read, Edward T. Farish, Modesto Ortiz, Teodora Ortiz de Martinez, Francisco Ortiz, Nestor Sandoval, Marcus Ramirez, Louis Ortiz and Juan Ortiz, thereby commanding them and each of them and their confederates, under certain penalty therein to be limited personally to appear before your honor in this honorable court on the first day of next term thereof, to be held in and for the county of Santa Fé, and then there full, true, direct and perfect answer make to all and singular the premises and further to stand to, perform and abide such further order, direction and decree therein as to this honorable court shall seem agreeable to equity and good conscience; and your orator, as in duty bound, will ever pray.

C. H. GILDERSLEEVE.

FISKE & WARREN,
THOMAS SMITH,
GEO. C. PRESTON,
Sol's for Gildersleeve.

And afterwards, to wit: on the fifth day of March, 1887,
187 the said defendant, The New Mexico Mining Company by its solicitors filed in said clerk's office its answer to said amended cross-bill of Charles H. Gildersleeve, which is in the words and figures *as* following, to wit:

TERRITORY OF NEW MEXICO,
County of Santa Fé.

In the District Court of the First Judicial District, February Term, 1887.

CHAS. H. GILDERSLEEVE
vs.
THE NEW MEXICO MINING COMPANY *et al.*

Separate Demurrer and Answer of the New Mexico Mining Company to Amended Cross-bill.

The respondent, now and at all times hereafter, saving and reserving all manner of benefit and advantage to itself of exception to the many errors and insufficiencies in said amended cross-bill contained, for answer thereto, or unto so much thereof, or such parts thereof, as this respondent is advised is material for it to make answer or demur, demurs to so much of said amended cross-bill of the said complainant as is contained in the following extracts, to wit: Commencing at the 14th line of the 10th page thereof, and ending with the 50th line of the 10th page in words and figures, as follows: "And your orator further shows that upon receiving the letters patent and claiming the said land and premises thereunder, it became and was the duty of the said defendant, The New Mexico Mining Company as trustee aforesaid of the said Brevoort, not only to protect the said estate from waste and injury, but also to protect the same as against injurious and illegal clouds on the title thereof; but your orator further shows that the said defendant company, unmindful of its duty *of* the premises, permitted the said defendant, Stephen B. Elkins and others claiming title to a certain land grant or private land claim known and officially
188 designated as the 'Mesita de Juana Lopez,' the said — being a grant of land situate wholly north of the Galisteo river in the said county of Santa Fé, to procure to be made falsely and fraudulently a survey of the said last-mentioned land grant by the surveyor general of said Territory, by which the lands embraced in the said last-mentioned land grant are made to appear to extend upon and over the northwest part of the said Ortiz Mine grant so as to encroach upon and embrace twenty thousand acres, more or less of the said Ortiz Mine grant and the lands and premises, part of the said four square leagues, and also fraudulently and falsely and by means of falsely representing to the said surveyor general and the said Commissioner of the General Land Offi-e, that the said false and fraudulent survey was true and correct, and the said land grant, 'the Mesita de Juana Lopez,' included the said area of twenty thousand acres, more or less, of the said Ortiz Mine grant, procured the said false and fraudulent survey of the said land grant, the 'Mesita de Juana Lopez,' to be approved by the said surveyor general and Commissioner.

"And your orator further shows that the said land grant, the

'Mesita de Juana Lopez,' is a valid Spanish grant made by the Kingdom of Spain long prior to the making of the said Ortiz Mine grant, and the said Spanish grant has been duly confirmed by act of the Congress of the United States, wherefore and by means of the premises the said survey of the said Spanish land grant is (the same being valid on its face and without proof of the said false representations and false and fraudulent survey), a cloud on the title of the said Ortiz Mine grant."

And as to so much of said amended cross-bill as in any manner refers to the "Mesita de Juana Lopez" this respondent doth
189 demur and for cause of demurrer shows that the said complainant has not made or stated in such portions of said amended cross-bill such a case as entitles him in a court of equity to the relief prayed for or any part thereof, because the same is multifarious and is nowise connected with the subject-matter in litigation in the original bill of Edward T. Farish *et al.* or of the real matter in issue in the amended cross-bill of the said Charles H. Gildersleeve and would introduce new parties not in any manner connected with or interested in the other cause of complaint in the said amended cross-bill, because the same is so indefinitely stated that it would be impossible for a decree to be rendered therein, and this respondent for said reasons prays judgment of the court as to such parts of said amended cross-bill as it has demurred to as aforesaid.

And this respondent as to the residue of said amended cross-bill for answer thereto or to so much and such part thereof as it is advised it is material or necessary for it to make answer unto, answers and says:

It admits that said Edward T. Farish, Benjamin M. Reed, Larkin G. Reed, Alexander Reed, Modesto Ortiz, Teodora Ortiz de Martinez and Francisco Ortiz her husband, four of the defendants in said amended cross-bill named, did, on or about the 29th day of January, 1883, file their bill of complaint in this honorable court against Elias Brevoort and the New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee, R. W. Donnell, Larz Anderson, Nestor Sandoval, Marcus Ramirez, Louis Ortiz and Juan Ortiz, thereby claiming the matters and things set up in said amended cross-bill and alleged to have been prayed for, and especially claiming an undivided half interest in the lands and patents set forth in said bill of complaint and afterwards referred to in said amended cross-bill, and that they be let into the possession and enjoy-
190 ment of said interest, all of which will appear more particularly by reference to said amended cross-bill, reference thereto being hereby made for that purpose.

Respondent denies that prior — the filing of said bill of complaint and of the answer thereto by said Brevoort the said Brevoort, Knaebel and complainant were the sole owners as tenants in common of all the land described in said bill of complainant; and as to the allegation that by an agreement made by and between said Brevoort, Knaebel and complainant, said Brevoort entered his appearance in said suit and filed his answer to said bill under the ex-

press understanding, arrangement and agreement that said answer should be for the joint use and benefit of all of said parties, namely, Brevoort, Knaebel and complainant, and that afterwards, to wit, on the 11th day of July, 1884, by like agreement, understanding and arrangement, the said Brevoort filed in said suit his cross-bill, to which this bill is now an amendment, for the joint benefit of said complainant, Brevoort and Knaebel, respondent has no information on which to form a belief and therefore denies the same and requires strict proof thereof, but alleges that when the said agreement was so made and entered into, it was fraudulent and void and that the consideration for the making of said agreement, or pretended agreement, was illegal, champertous, against public policy and for the purpose of aiding and encouraging litigation, and contrary to the statutes in such cases made and provided.

It admits that prior to the acquisition of New Mexico by the United States and prior to the making of the treaty of Guadalupe Hidalgo by and between the United States and the Republic of Mexico, Jose Francisco Ortiz and Ignacio Cano, two citizens of the Republic of Mexico, had only acquired by grant from the
191 said Republic of Mexico, certain mining lands, privileges and premises, situated in the department or Territory of New Mexico, and now being within the limits of the county of Santa Fé in the present Territory of New Mexico, and now know- and designated as "The Ortiz Mine grant," the same consisting of a certain gold mine formerly known as the mine of Santa Rosalia and now known as the Ortiz mine, together with four square leagues of land including the said mine, the boundaries of which are more particularly described in said amended cross-bill; but this respondent denies that said grant was a perfect and complete grant so as to vest the legal title to said mine and premises in said grantees, or had any other force and effect than as is hereinafter stated in this answer.

Respondent alleges the truth to be in and about the execution of said grant to said Jose Francisco Ortiz and Ignacio Cano, that they registered in the office of Francisco Baca y Ortiz, the constitutional alcalde of Santa Fé, on the 1st day of December, 1833; that the said alcalde placed them in possession of said mine by virtue of the discovery thereof and in pursuance of a petition made by them, the said Jose Francisco Ortiz and Ignacio Cano, under and in pursuance of the mining laws of Mexico, that at the time that they so petitioned said alcalde for the possession of said mine, they prayed that said constitutional alcalde should provide for their said petition in accordance with the ordinance on mining; that the said constitutional alcalde only admitted the said petition of said Ortiz and Cano and placed them in possession after having examined and taken proof in the premises as required by law; that after said possession was given by said constitutional alcalde, the said Ortiz and Cano represented to said alcalde that they were authorized to be invested
192 with necessary water supplies and issues for the working of machinery and for the pasturage of cattle, to be used in connection with the working of said mine of Santa Rosalia, and to that

end petitioned the said alcalde for the same to be given them in possession, and that the said alcalde (so far as he was competent so to do) granted to the said Ortiz and Cano for the said purposes, the land adjacent to said mine of Santa Rosalia, four leagues square, that is to say, two leagues each way to each cardinal point of the compass from the said mine, but without any detriment to third persons, and placed them in possession thereof (so far as he was able so to do), for the purposes referred to; all of which facts will more fully appear by reference to a translated copy of the original papers given by said Francisco Baca y Ortiz, in the premises, which respondent prays leave to file hereafter, and that the same may be taken and considered as a part of this answer.

Respondent alleges, as it is advised, that the said acts and doings of the said Ortiz and Cano and the said alcalde in the premises, did vest in the said Ortiz and Cano an inchoate title and equitable estate in said mine and lands for the purposes mentioned.

Respondent admits that said Cano granted, bargained, sold, released and conveyed to said Ortiz, as stated in said amended cross-bill, all of the estate, right, title and interest which the said Cano in any manner had, in and to the said mine and said four leagues square of land; and it further states that it is not at present informed where the said deed of conveyance thereof can be *informed.* It admits that after said conveyance by said Cano to said Ortiz, said Ortiz remained and continued in the sole and exclusive possession of the said mine and the said *mine and the said* land, under the
193 terms and conditions of the possession given him by said Baca y Ortiz as constitutional alcalde.

Respondent is not informed as to the exact date of the death of said Jose Francisco Ortiz, but is informed and believes that he died some time between the year eighteen hundred and forty-one and the year forty-six, but denies that he died intestate. It admits that he left him surviving his widow and that he left no direct heirs, ascendant or descendant, and it denies that his only heirs-at-law were Maria de la Luz Ortiz and the children of Ignacio Ortiz, deceased; but it states the fact to be that the said Jose Francisco Ortiz, prior to the time of his death, to wit, on the fifteenth day of August 1841, made and *and* executed his last will and testament, and which said will and testament was in full force and had not been revoked or annulled at the time of the death of said Jose Francisco Ortiz, but was and is a good and valid will and testament according to the laws and customs in force in New Mexico at the times of the date of said will and the death of said Jose Francisco Ortiz; that under and by virtue of the terms of said will, the said Jose Francisco Ortiz made and constituted Maria Ynes Montoya commonly called Maraquita Montoya, at that time his wife, as his sole and only heir to all of his property, which he held or possessed at the time of his death, of whatever class or description the same might be, a copy and translation of which last will and testament marked "Q," is herewith filed and made a part of this answer; and respondent here states the fact to be, that under and by virtue of said last will and testament, the said Maria Ynes Montoya became the owner

and was possessed of all the right, title, estate and interest which the said Jose Francisco Ortiz, at the time of his decease, held or possessed either legally or equitably in
194 and to the mine and land in question, and she thereupon took possession of the same, claiming the same under and by virtue of the terms of said last will and testament, and, from the date of the decease of said Jose Francisco Ortiz to the present time, she and her assigns have held possession of and claimed the said mine and lands in question by virtue of the said will and testament and divers and sundry deeds of conveyance purporting to convey an estate in fee-simple in and to the mine and lands in question, and that no claim by suit, either in law or equity, effectually prosecuted, prior to the filing of complainants' amended cross-bill, has ever been set up or made to the said mine, lands, tenements and hereditaments in question, and that the said Maria Ynes Montoya and her assigns have from the said date of the decease of said Jose Francisco Ortiz, hitherto held, occupied and possessed the said mine and land in question, solely and exclusively, and so held, occupied and possessed the sole and exclusive possession of the mine and lands in question constantly and without interruption in any manner whatever from any one, for a period of more than thirty-one years next preceding the date of the filing of the said amended cross-bill, claiming the same as their own under color of title and otherwise as before stated.

Respondent denies that the said Ignacio Ortiz was a brother of Jose Francisco Ortiz, or that he died intestate, or that the said Ignacio left him surviving as his only heirs-at-law, the six children named in said amended cross-bill, or that he had any heirs-at-law whatever; and it further denies that any of the said persons mentioned as children or heirs of the said Ignacio Ortiz, or the said Ignacio Ortiz himself held or possessed any part or portion of the mine and land in question, or
195 have ever in any legal way claimed, or pretended to claim, any estate, right or title in and to the mine and land in question, or any part thereof; and it further denies that any of the said children or heirs have at any time, by any deed or deeds of conveyance, duly made, executed, acknowledged or delivered to said Elias Brevoort or any one else for any valuable consideration, duly granted, bargained, sold or conveyed to the said Elias Brevoort complainant, or any one else, any right, title, interest or claim in and to the said mine and the privileges, premises and lands, as stated in said amended croos-bill; and it states the fact to be that, if any of said pretended children or heirs of said Ignacio Ortiz, have ever made, or pretended to make, execute and deliver any deed or deeds of conveyance to the whole or any part of the mine and lands in question, such deeds were made without any due and lawful consideration and under an illegal and champertous bargain and contract, and at a time when neither of them had a right to make or execute any legal and valid deed of conveyance to the whole or any part of the mine or land in question, and, if any such deeds have been made and delivered to said Elias Brevoort complainant or any

one else, the same are wholly illegal and void and confer upon the said complainant no right to maintain or claim any legal interest, either legal or equitable, in and to the whole or any part of the land and mine in question.

Respondent further denies that either the said Ignacio Ortiz was the brother or that the said Maria de la Luz Ortiz was a sister of the said Jose Francisco Ortiz, or that the said Maria de la Luz Ortiz intermarried with one Manuel Sanchez; or that she died intestate, or left her surviving as her only heirs-at-law the five children
onamed in the said amended cross-bill, to wit, Esmerejildo
196 Sanchez, Domingo Sanchez, Ignacio Sanchez, Herenio Sanchez and Rosaria Sanchez; it further denies that the said Rosaria intermarried with one Rafael Romero, or that she or her said husband died intestate, or that they left an only child them surviving named Josefa Romero, or that said Josefa Romero was ever intermarried with one Jesus Garcia, or that the said Maria de la Luz Ortiz ever had any heirs-at-law whatever.

And respondent further denies that any of the said persons mentioned as children or heirs of the said Maria de la Luz Ortiz, or the said Maria de la Luz Ortiz herself, ever, at any time, occupied, held or possessed any part or portion of the mine and lands in question, or have ever in any legal way claimed, or pretended to claim, any estate, right or title in and to the mine and land in question, or any part thereof; and it further denies that any of the said children or heirs have at any time, by any deed or deeds of conveyance, duly made executed, acknowled- or delivered to Elias Brevoort, complainant, or any one else, for any valuable consideration, duly granted, bargained, sold or conveyed to the said Elias Brevoort complainant or any one else, any right, title, interest or claim in an- to the said mine and the privileges, premises, and lands as stated in said amended cross-bill; and it states the fact to be that, if any of said pretended children or heirs of said Maria de la Luz Ortiz have ever made, or pretended to make, ex-cute and deliver any deed or deeds of conveyance of the whole or any part of the mine and lands in question such deeds were made without any due and lawful consideration and under an illegal and champertous bargain and contract, and at a time when neither of them had a right to make or execute any legal and valid deed of conveyance to the whole or any part of the mine or land in question; and if
197 any such deeds have been made and delivered to said complainant Elias Brevoort, or any one else, the same are wholly illegal and void, and confer upon the said complainant no right to claim or maintain any interest, either legal or equitable, in and to the whole or any part of the land and mine in question.

And respondent further says that it has no information or belief as to whether or not on the first day of July, 1880, the said Elias Brevoort granted, bargained, sold and conveyed to complainant and one John H. Knabel an undivided one-half part, share and interest in said grant and executed a deed of conveyance therefore; and it expressly denies that, if any such conveyance was ever so made and executed, the same was done for a good and valuable consideration,

but alleges the fact to be on information and belief that, whatever deed the said Brevoort had made to said complainant and to said Knaebel conveying an interest in said grant, was made for an illegal and champertous purpose and to encourage litigation and contrary to the statutes in such cases made and provided; and it expressly denies that on September 3d, 1885, or at any other time prior to the dismissal of his said cross-bill by said Elias Brevoort and prior to the time that said Elias Brevoort conveyed his interest in said grant to respondent, the said deed was by complainant filed for record and recorded in the office of the recorder of deeds of Santa Fé county; and it denies that, prior to June 18th, 1886, the said New Mexico Mining Company well knew and had actual notice and knowledge that the said Brevoort had granted, bargained, sold and conveyed an undivided one-half interest in and to said grant to complainant and said Knaebel.

198 Respondent denies that Abram Ortiz, mentioned in said amended cross-bill, departed from this Territory more than twenty years since, or that he has not been heard from within the seven years previous to the filing of said amended cross-bill, or the date of said pretended deed of conveyance to said Elias Brevoort, complainant, or any one else; and it also denies that said Abram is dead, or that, if he is dead, he died before the execution and delivery of said deeds to said Elias Brevoort, or that he died without any descendants.

Respondent admits that in conformity with a certain act of Congress of the United States, approved July 2d 1854, mentioned and referred to in said amended cross-bill, the surveyor general for the Territory of New Mexico investigated the matter and title to the land and mine in question, and examined, considered and determined upon the fact and validity of the said grant, and it also alleges that he considered and determined as to the title to said mine and lands in question, and as to who was the then owner thereof, and that, in the twenty-fourth day of November 1860, he duly made his report and decision pursuant to said act of Congress, and that therein and thereby he decided the said grant to be authentic and valid, and respondent here states the fact to be that in said report and decision it was decided that the then claimants, A. Rencher, Elisha Whittlesey, Ferdinand W. Risque, Andrew S. O'Bannon, Charles E. Sherman, N. M. Miller and Thomas J. Walker, (they being the same persons who had petitioned the said surveyor general for the confirmation of said title), had at the time a full and complete title to the said property; said surveyor general therefore approved said grant and recommended its final confirmation by Congress. It further states the fact to be that the said parties who petitioned the said surveyor general for the confirmation of said grant exhibited their title to the

199 same to the said surveyor general, who received them in evidence and considered and passed upon them in making up and coming to his decision in the premises, in accordance with the eighth section of the act of Congress aforesaid. It further states the fact to be that the said petitioning claimants had, by an act of the

legislative assembly of the Territory of New Mexico, approved February 1st, 1858, been made and constituted a corporation and body politic under the name and style of "the New Mexico Mining Company;" that after the said corporation was formed, the said petitioning claimants transferred and conveyed the mine and property in question to the said corporation company; but it denies that said surveyor general decided said mine and lands to belong to or to be the property of all or any one or more of the said persons from whom said complainant claims that said Elias Brevoort purchased and received the conveyance of the same.

Respondent admits that, in pursuance of the said act of Congress, the said Congress on the first day of March 1861 passed another act confirming the said claim of the above-mentioned A. Rencher, Elisha Whittlesey, Ferdinand W. Risque, Andrew J. O'Bannon, Charles E. Sherman, N. M. Miller and Thomas J. Walker, but denies that said confirmation operated in any manner to confirm said claim for the benefit of any one else than the persons last above mentioned and the said New Mexico Mining Company and its and their assigns. For a more particular description and understanding of the said act, reference is hereby made to the same in chapter 66, page 887, vol. 12, U. S. Statutes at Large; which said act is hereby made a part of this answer, a copy being filed herewith.

Respondent alleges that the said act of confirmation oper
200 ated as a new and enlarged grant to the said A. Rencher and six others above named as petitioning claimants and to the New Mexico Mining Company as their assign and that said confirmation conferred upon and vested in the said petitioners and their assigns full and absolute title in fee-simple in and to the said tract of land and all the mines thereon.

Respondent admits that the said tract of land was surveyed at the time and as stated in said amended cross-bill, and that the same was approved by the Commissioner of the General Land Office, as therein stated; and respondent here states the fact to be, that the mine in question was a permanent fixed monument and the boundaries of the said grant being two Spanish leagues, north, south, east and west from the initial point, were necessarily fixed and easily determined by any one and not in any manner uncertain or impossible to ascertain even without an official survey, as will more fully appear by reference to the act of juridical possession of said mine and said lands.

Respondent admits that the whole of said land is situated in the county of Santa Fé and is particularly described as stated in said amended cross-bill.

Respondent positively denies that the said defendant "The New Mexico Mining Company" at any time whatever, wrongfully, falsely or fraudulently declared or represented to any one whomsoever that the said company had acquired by purchase from any one whomsoever the property in question; but it states the fact to be that the said defendant, "The New Mexico Mining Company" had acq-ired the whole of the title and estate to the whole and every part and portion of the mine and land in question, and so repre-

sented and claimed the same, but it denies that any such representations or declarations were either wrongful, false or fraudulent; and it further states the fact to be that the said
201 defendant, "The New Mexico Mining Company" and those holding under it through divers mesne conveyances have acquired by purchase from the legal representatives, legatees, devisees and assigns of said Francisco Ortiz, the whole of the said mine and lands in question, and that the said "The New Mexico Mining Company" does come within the intent and scope of said act of confirmation and was entitled, before the sale and conveyance by it, to be recognized by the United States and all lawful authorities as the sole and only assign and owner of the said original grantees' *in*interest in said mine and land in question, and as the sole lawful claimant of the said grant of land and mine and entitled to letters patent therefore from the United States; the said New Mexico Mining Company having acquired the title to the same by purchase and conveyance to it from said Rencher and others prior to the confirmation thereof by said act of Congress of March 1st, 1861, a schedule, synoptical exhibit and brief of which was transmitted by the surveyor general of New Mexico along with his decision, papers and conveyances, and a copy of the original grant, and was before the Congress at the time of its confirmation of the title in question, as a part of the decision and report of said surveyor general, a copy of which is herewith filed and made a part of this answer.

Respondent admits that the said New Mexico Mining Company did apply for letters patent to be issued in its name for all and singular the said tract of land by the President of the United States, but it denies that it did so upon any false or fraudulent declarations, representations or suggestions to any one whomsoever.

Respondent admits that two hundred and fifty-nine acres
202 more or less of the land in question were included in the patent to the Cañon del Agua grant of land and were not included in the patent for the land in question herein.

Respondent absolutely denies that any of the declarations, representations or suggestions of the said New Mexico Mining Company with reference to the property in question, or to the title to the same, were either false or fraudulent, or that the said company knew that such were false or fraudulent.

Respondent admits that the President of the United States issued and delivered letters patent to the New Mexico Mining Company for the property in question, except the two hundred and fifty-nine acres aforesaid, on the 20th day of May 1876, but it denies that he was induced and misled to do so by any false or fraudulent representations or that he had any intent to issue said letters patent to the said complainant or any of the persons under whom he pretends to claim title, or that he intended to issue the same to or for the use and benefit of any person other than the New Mexico Mining Company, which had become the claimant for said land by virtue of the conveyance to it by said A. Rencher and the six other petitioning claimants, and to which the title to the land in question had been

confirmed by the decision of the said surveyor general and by the act of Congress March 1, 1861.

Respondent denies that the said grant to Ortiz and Cano and the examination by the surveyor general are recited in said patent, but admits that the report and survey of the surveyor general respecting the same and the act confirming the same, and the conflict of description respecting the said two hundred and fifty-nine acres were all recited among other things in said patent; and it further states the fact to be that, not only the foregoing matters and things
203 were recited in the said patent, but there were many other matters and things recited in the same with reference to the title to the said mine and lands, the tenor of which was that the said patent was properly issued, as will more fully appear by reference to a copy of said patent which is hereby made a part of this answer and which the said respondent now prays leave to hereafter file herewith, the same not being at present in its power, possession or control.

Respondent admits that the United States by said patent gave and granted to the New Mexico Mining Company the tract of land and mine in question, as stated and set forth in said bill, with the exception and proviso in said bill mentioned.

Respondent further admits that the said New Mexico Mining Company did occupy, possess and enjoy the said tract of land as patentee thereof and remained and continued in the possession and enjoyment thereof under the same claim until it sold, transferred and conveyed the same unto Stephen B. Elkins and Jerome B. Chaffee; and it further states the fact to be, that not only did the said New Mexico Mining Company occupy, possess and enjoy the said land and mine from and ever since the day of the issuance of the patent therefor to it, but that the said New Mexico Mining Company did also occupy, possess, hold and enjoy the said mine and land under claim of right and title thereto ever since the date of the creation and organization of said company as a corporation in the year 1858, without any interruption or interference from any one whatever, and without any suit either in law or equity for the possession thereof being commenced and successfully prosecuted against it.

204 Respondent absolutely denies that the said complainant was at the time of the issuance of the said letters patent in any manner a representative or assign of the said Ortiz and Cano, or of the said Mexican grant or any part thereof, by virtue of any deed or anything whatever, but states the fact to be that the said New Mexico Mining Company was the only legal representative and assign of the said Ortiz and Cano and of the said grant of land and the only owner of the said grant of land at the time of the issuance of said patent, and the only person to whom said patent could lawfully issue at the date thereof.

Respondent absolutely denies that the said complainant or his pretended assignors, or either of them, was such a person as the lands included in said patent were intended to be confirmed, assured or granted to by the said act of Congress, or that they or either of

them (said complainant and his pretended assignors) were entitled to receive and enjoy said letters patent or the estate and property thereby intended to be granted or confirmed, or that the said complainant or his assignors ever had, held or possessed any estate, either legal or equitable, in and to the lands in question or any part thereof.

Respondent denies and says it is not *time*, as stated in said amended cross-bill, that, in all and singular the proceedings had by and before the said surveyor general touching the investigation, examination, consideration and determination of the said Mexican grant and the private land claim thereunder the said defendant, The New Mexico Mining Company, appeared and falsely and fraudulently represented itself to be the only assign and representative of the said original grantees, Jose Francisco Ortiz and Ignacio Cano, and of the said Mexican grant, and that it was only by force and
205 by reason of said false and fraudulent representations that the said defendant, The New Mexico Mining Company, was ever recognized by the said surveyor general as such assign and representative, but states the truth to be, that said New Mexico Mining Company never made any representations to said surveyor general as to its ownership or interest in said grant, except such as were true and in accordance with the *seal* facts.

Respondent admits that, while the said proceedings were pending before the said surveyor general, preliminary to the said report and act of confirmation, the defendant, The New Mexico Mining Company, claiming to be the assignee of the original grantees of said grant, and claiming only as such assign and representative, entered upon and occupied said grant. It admits that it pretended to be the only assign and representative of said original grantees, but denies that said pretensions were false, and states the fact to be, that it did not only enter upon certain parts but entered into the possession of the whole thereof. It denies, as alleged in said bill, or otherwise, that in all of its said acts and doings, claims and representations, before the said surveyor general, as well as in so entering upon and occupying said granted premises, the said defendant, The New Mexico Mining Company, was in no manner or degree beneficially interested or *intitled* in or to the said land or premises, or any part thereof but was, and it always thereafter remained merely a trustee by its own wrong and fraud aforesaid for the use and benefit of the lawful heirs and representatives aforesaid of the said Jose Francics Ortiz.

Respondent denies absolutely that the said New Mexico Mining Company either received the said letters patent, or occupied, possessed, or enjoyed the estate and property therein described
206 for the use and benefit of complainant in any respect whatever, or that the said company never acquired or possessed any beneficial right, use, estate, property or interest whatever in the said letters patent, or thereunder, or in the lands and property thereof granted.

Respondent admits that the New Mexico Mining Company by deed or conveyance, by it executed, did convey to Stephen B. Elkins

and Jerome B. Chaffee, the tract of land so patented as aforesaid, in fee-simple, but it denies that the said Stephen B. Elkins and Jerome B. Chaffee now hold the title to said land as trustees for themselves and the respondent, Larz Anderson and other persons who contributed their portion or share of the purchase-money for the same, or that the same is now held, possessed or owned by the said Stephen B. Elkins and Jerome B. Chaffee as trustees, but allege the truth to be that heretofore, to wit: on the 4th day of April 1884, in pursuance and execution of said trust and at the request and instigation of the parties in interest, said Elkins and Chaffee reconveyed said premises to this respondent.

Respondent denies that the complainant has filed with his amended cross-bill any copy of the said letters patent.

Respondent admits that before it received or accepted any of the deeds of conveyance to it and before it claimed or acquired any interest in the said tract of land, it had notice of the said Mexican grant to Ortiz and Cano, but it denies absolutely any notice of any rights whatever, either legal, equitable or pretended, of any persons claiming to be legal representatives of the said Ortiz and Cano, derived under the said grant or said act of Congress confirming the same, or the said patent, except that it did have notice that the said Mariquita Montoya was the sole and only heir, legatee and
207 devisee and legal representative of said Ortiz and Cano, and was the only one who legally represented the said Ortiz and Cano as their successor in the title to the land in question, prior to the time of her sale and conveyance thereof to the said John Greiner, and that her assigns are the only persons since her conveyance to the said Greiner, including the said A. Rencher and his associates, the said New Mexico Mining Company, this respondent, and its associate owners, who have owned, held or had any right or estate whatever in or to the lands in question or any part thereof.

Respondent absolutely denies that the said New Mexico Mining Company never acquired or possessed any beneficial estate, right or interest, under or by means of the said letters patent, or that by such means it only acquired the nominal or legal title to the said tract of land, or as trustee for said complainant, or for his use or benefit, or that it ever at any time, had any notice of any such pretended facts as alleged in said bill.

Respondent admits that the said New Mexico Mining Company yielded the occupation and possession of the said land to its vendees, Elkins, Anderson and Chaffee and their associate owners, and that they did claim and enjoy the said tract of land together with the rents, issues and profits thereof, to their own use and to the exclusion of said complainant and every one else, and that they and those through whom they claimed, from and including the said Mariquita Montoya, did at all times since the death of said Jose Francisco Ortiz, hold, possessed, occupy and enjoy, solely and exclusively, the said entire tract of land and the rents issues and profits thereof, and without the consent of the said complainant or his pretended vendors, who never at any time held or possessed any right, title or estate, or

valid claim, either in law or equity, to any part or portion of
208 the said land in question, and that his or their consent was in no manner material or necessary to the said respondent and those through whom it claims title, to the occupation, possession and enjoyment of the lands in question; and it further states the fact to be, on information and belief, that neither the said complainant, nor any of his alleged or pretended vendors, ever at any time heretofore, prior to the filing of said amended cross-bill, made any legal objection or protest against said respondent and those through whom it claims title to the lands in question as aforesaid, occupying, possessing, holding or enjoying the whole or any part or portion of the lands in question, as against them or any one else; but respondent denies that the said Elkins, Anderson and Chaffee and their associates, are now the owners, or are now in possession of said premises, but alleges the fact to be that, on the 4th day of April, 1884, the said Elkins and Chaffee who were innocent purchasers of said premises for value, having purchased the same and paid therefore the sum of three hundred and seventy-five thousand dollars, without any notice of any claim or pretended claim upon the part of complainant or of any one else, did, upon the day last aforesaid, sell and convey the said premises to this respondent, which purchased the mine *bona fide* and in good faith, and without any knowledge of any claim of an outstanding title to said premises existing in the said complainant or any one else.

Respondent admits that said tract of land contains much valuable and growing timber, and also many valuable mines and mineral beds of gold, silver, copper, lead and coal, and that the same is of great value, but of what value it is not informed and therefore is unable to state the same. It also admits that it is preparing
209 to open and operate some of the mines and mineral beds and convert the said mineral thereof to its own use, but it denies that it is cutting or preparing to cut any of the said timbers, or that it has any present purpose of cutting or using the same except where the same may be requisite and necessary in opening and working the mines and mineral beds aforesaid; and it absolutely denies that it has committed, or is threatening to commit, any waste on the said tract of land. On the contrary, it states that since the purchase of the property by said Elkins, Anderson and Chaffee and their associate owners, they and the respondent have spent in improving and developing the same about one hundred thousand dollars, besides paying the taxes thereon. It admits that it does propose and intend to convert the *the* said timber, minerals and other products thereof to its own use without obtain-g the consent of said complainant, as it does not recognize in him any right to either consent, protest or object to the use theaeof.

Respondent absolutely denies that it has had any notice or knowledge of any trust existing as pretended, claimed and stated in said amended cross-bill, in said complainant's behalf, and it further denies that any such trust ever has existed or that the said complainant has, or ever has had, any right, either legal or equitable to the

said lettess patent issued to the New Mexico Mining Company, or to the tract of land therein discribed and conveyed.

Respondent absolutely denies any and all combina- or confederation with any person, as stated in said amended cross-bill, or that it has contrived how to wrong or injure the said complainant in the premises, that it has refused to do equity towards the said com-*com*plainant in the premises, hereby denying that he is entitled to any equitable relief in the premises. It denies that said com-
210 plainant has made any repeated request, or any requests whatever, of it in the premises, except so far as they are made in and by this amended cross-bill, or that he has any right on which to base any such request; and it not only pretends now to deny but has at all times heretofore denied and still does absolutely deny that the said complainant is the assign of all or any part or portion of the estate, right, title, interest and claim, whereof the said Jose Francisco Ortiz died seized or possessed of in or to the mine and tract of land in question. It admits that it pretends, and does here state it as a fact, that said Mariquita Montoya, deceased, whose true name was Maria Ynes Montoya, the widow of said Jose Francisco Ortiz, inherited the said mine and tract of land as sole and only heir, legatee and devisee of said Ortiz, and that she thereafter conveyed the same to the said John Greiner, and that the said John Greiner conveyed the same to the said Abraham Rencher, Elisha Whittelsey, Ferdinand W. Risque, Andrew J. O'Bannon, C. E. Sherman, N. M. Miller and Thomas J. Walker, and that thereafter the said last-named persons, or their assigns, conveyed the same to the said respondent, the said New Mexico Mining Company, prior to the conveyance thereof by the said company to said Elkins and Chaffee. It also admits that it does pretend, and does here allege the fact to be, that, before the said conveyance, said Mariquita Montoya had acquired the said mine and tract of land by means of a will and testamentary writing and instrument executed by the said Jose Francisco Ortiz in his lifetime; and it furt*u*er admits that it does pretend, and here states the fact to be, that the said letters patent were not intended for the benefit of the said pretended vendors of said complainant, but the same were intended for the benefit and use solely of the said New Mexico Mining Company and its assigns, as the legal and only owners thereof, in
211 law and equity, from the said Jose Francisco Ortiz and said Mariquita Montoya, who was his sole and only heir and legal representative by virtue of the will aforesaid, and were also the owners thereof by virtue of having possessed, occupied, held and enjoyed by themselves and their assignors and vendors continuously and without interruption from the date of the death of said Jose Francisco Ortiz, to the day of the date of said letters patent and to the date of the filing of said amends cross-bill said tract of land and mine, claiming title to the same under the said original grant and grantees, their heirs and assigns, by and through said will and various deeds of conveyance purporting to convey in fee-simple the entire estate and the title in and to said mine and tract of land. And it admits, that, it does pretend the fact to be that the

said Elkins, Anderson, Chaffee, and their associate owners, and no one else, were the lawful owners and holders of said timber, mineral and other products, and of all of the rents, issues, and profits of said tract of land, and as such were entitled to appropriate and enjoy the same to their own use and to the total exclusion of the said complainant. Respondent absolutely denies that the said complainant is in any manner whatever the representative or assign of said Jose Francisco Ortiz or Ignacio Cano, with respect to the said grant, or that he in any manner is entitled to any benefit or advantage of said act of confirmation or letters patent.

Respondent further denies that any of its actings, doings or pretences is contrary to equity or good conscience, or that they tend to the wrong, injury or oppression of said complainant in the premises.

Respondent files herewith a translation into English of the said original grant papers to Ortiz and Cano of the said Santa Rosalia mine and said tract of land marked "P;" also a translation
212 into English of the said will of Jose Francisco Ortiz, marked "Q;" also a copy of deed of conveyance of Mariquita Montoyo to John Greiner of the said mine and tract of land, marked "R;" also a copy of the deed of conveyance of John Greiner to Abram Rencher, Elish- Whittlesey and others of the land in question, marked "S;" also, copy of deed of conveyance of the association known as "the New Mexico Mining Company" to the corporation known as "the New Mexico Mining Company" by its trustees, marked "T;" also copy of deed of the corporation known as "the New Mexico Mining Company" to Stephen B. Elkins and Jerome B. Chaffee, trustees, marked "V;" also, copy of the deed of Elkins and Chaffee, trustees, to respondent, The New Mexico Mining Company, marked "W."

Respondent further states, that before the complainant exhibited his said amended cross-bill in this honorable court, this respondent, together with its vendors, assignors, antecessors and those through whom it claims title to the mine and land in question, had had possession of the mine and lands, tenements and hereditaments in question, described in said amended cross-bill, for more than ten years, which said mine and lands had been granted in the year 1833, by the government of Mexico, through its officers empowered to make such grants to their antecessors, Jose Francisco Ortis and Ignacio Cano; the said respondent and those through whom it claims title, from the time of the sale by the said Ignacio Cano to the said Jose Francisco Ortiz, and from the time of the death of the said Jose Francisco Ortiz, more than thirty years prior to the filing of said amended cross-bill, having held possession of the said mine and lands, claiming the same under and by virtue of divers and sundry mesne deeds of conveyance, grants,
213 and divers instruments, purporting to convey an estate in fee-simple in and to the said mine and lands from the said Ortiz and Cano regularly down to the said respondent, and that no claim by suit, either in law or equity, effectually prosecuted, has been set up or made to the said mine, lands, tenements,

os hereditaments, within the aforesaid period of thirty years, and that said complainant in said amended cross-bill, and his assignors and antecessors, have neglected for the said term of thirty years next preceding the filing of said amended cross-bill, to avail themselves of any title, legal or equitable, which he, she or they may have had to the said mine and lands, tenements or hereditaments, mentioned in said bill, or any part or portion thereof, by any suit in law or equity effectually prosecuted against the person or persons so as afor-said in possession.

And respondent further alleges and states that the said amended cross-bill was not filed nor the said suit herein commenced for the said mine, lands, tenements and hereditaments, mentioned and described in said amended cross-bill, within ten years next after the said complainant's right to commence, have or maintained said suit had come, fallen or accrued to him, his grantors or antecessors.

And respondent further alleges and states that the said complain-t's cause of action did not accrue within the ten years next preceding the filing and exhibiting of his said amended cross-bill in this suit.

Respondent says that on or about the — day of July, 1880, Elias Brevoort filed his bill in equity in the first judicial district of the Territory of New Mexico, sitting in and for the county of Santa Fé, against this respondent and Jerome B. Chaffee, S. B. Elkins and R. W. Donnell, the persons through whom the respondent claims title to said premises, except R. W. Donnell, claiming the identi-
214 cal premises now in controversy, upon the same grounds as stated and set forth in said amended cross-bill; that after the filing of the said bill as aforesaid, the respondent- therein appeared and filed their answer to the same, forming the same issues of fact as are formed in the bill and answer in this suit, except that R. W. Donnell disclaims all interest in said premises, and that a large amount of testimony was taken, and afterwards said bill was called up and by said court dismissed and a final decree rendered in favor of defendant in said action and against the complainant therein; a full true and perfect copy of which said bill, answer and all papers filed therewith, together with all of the testimony taken in said cause, and the decree and order entered in said cause, respondent asks leave to hereafter file in this cause, the same not being now in its possession.

All which matters and things this respondent is ready to aver and prove as this honorable court shall direct, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

PRESIDENT OF THE NEW MEXICO MINING COMPANY.
ALFRED J. WOLF,
[SEAL.] *Agent and Attorney-in-fact of the New Mexico Minging Company.*

W. T. THORNTON,
Att'y & Solicitor for Respondent.

I, W. T. Thor-ton of counsel for respondent, herein, do hereby certify that in my opinion the foregoing demur-er is well founded in point of law.

Santa Fé, N. M., March 4, 1887.

W. T. THORNTON.

215 TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

On this — day of March 1887, before me personally appeared the above-name- Alfred J. Wolf, as agent and attorney-in-fact of the New Mexico Minin*ing* Company, and made oath that he has read the above answer, subscribed by him as agent and attorney-in-fact of the above-named respondent, and knows the contents thereof, and that the same are true of his own knowledge except as to matters which are therein stated to be on information and belief; and as to those matters he believes them to be true.

Sworn to and subscribed before me this fifth day of March, 1887.

ALFRED J. WOLF.

And afterwards, to wit: on said fifth day of March 1887, said defendant, The New Mexico Mining Company, filed in said clerk's office its plea to said amended cross-bill, which *are* in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

In the District Court of the First Judicial District, February Term, 1887.

CHAS. H. GILDERSLEEVE }
vs. } In Chancery.
THE NEW MEXICO MINING COMPANY *et al.* }

Separate Pleas of the New Mexico Mining Company to Complainant's Amended Cross-bill.

This respondent by protestation, not confessing any of the matters in said amended cross-bill contained to be true in manner and form as the same are therein set forth, does plead there*with*, and for cause of plea says:

216 That heretofore and before the complainant exhibited his said amended cross-bill in this honorable court, this respondent together with its vendors, assignors, antecessors and those through whom it claims title to the mine and land in question, had had possession of the mine and lands, tenements and hereditaments in question, described in said amended cross-bill, for more than ten years, which said mine and lands had been granted in the year 1833 by the government of Mexico, through its officers empowered to make such grants, to their antecessors Jose Francisco Ortiz and

Ignacio Cano; the said respondent and those through whom it claims title from the time of the sale of said Ignacio Cano to the said Jose Francisco Ortiz, and from the time of the death of the said Jose Francisco Ortiz, more than thirty years prior to the filing of said amended cross-bill, having held possession of the said mine and land, claiming the same under and by virtue of divers and sundry mesne, deeds of conveyance, grants and divers instruments, purporting to convey an estate in fee-simple in and to said mine and lands from the said Ortiz and Cano regularly down to the said respondent, and that no claim by suit either in law or equity, effectually prosecuted has been set up or made to the said mine, lands, tenements or hereditaments, within the aforesaid period of thirty years, and that the said complainant in said amended cross-bill and his assignors have neglected for the said term of thirty years next prior to the filing of said amended cross-bill, to avail themselves of any title, legal or equitable, which he, she or they may have had to the said mine and land, tenements and hereditaments, mentioned in said amended cross-bill, or any part or portion thereof, by any suit in law or equity, effectually prosecuted against the person or persons so as aforesaid in possession; and therefore, this re-
217 spondent does plead the foregoing facts in bar to the said amended cross-bill.

And for a further plea herein, said respondent does allege and state that the said amended cross-bill was not filed nor the said suit herein commenced for the said mine, lands, tenements and hereditaments mentioned and described in said amended cross-bill, within the ten years next after the said complainant's right to commence, have, or maintain said suit had come, fallen or accrued to him, his grantors or antecessors, and therefore the said respondent does also plead said fact in *far* to the said amended cross-bill.

And for a further plea in this behalf, said respondent does allege and state that the said complainant's cause of action did not accrue within the ten years next preceeding the filing and exhibiting of his said amended cross-bill in this suit.

And for a further plea in this behalf, respondent says that on or about the — day of July 1880, the complainant Elias Brevoort, filed his bill in equity in the first judicial district of the Territory of New Mexico, setting in and for the county of Santa Fé, against this respondent and Jerome B. Chaffee, S. B. Elkins, and R. W. Donnel, the persons through whom this respondent claims title to said premises, except R. W. Donnell, claiming the identical premises now in controversy, upon the same grounds as stated in said amended cross-bill; that after the filing of the said bill as aforesaid, the respondents therein appeared and filed their answer to the same, forming the same issues of fact as are formed in the bill and answer in this suit, except that R. W. Donnell disclaims all interest in said premises, and that a large amount of testimony was taken, and
218 afterwards said bill was called up and by said court dismissed and a final decree rendered in favor of defendants in said action, and against the complainant therein; a full true and perfect copy of which said bill, answer and all papers filed therewith,

together with all of the testimony taken in said cause, and the decree and order entered in said cause, respondent asks leave to hereafter file in this cause, the same not being now in its possession.

And for a further plea in this behalf, respondent says that Elias Brevoort, under and through whom complainant claims and derives his title, filed a bill against respondent and others in this honorable court, claiming and alleging title to the premises in controversy in this suit, upon the same grounds as are now alleged by this complainant; that respondent filed its answer thereto; that issue was joined and a large amount of evidence was taken in said cause and the same was submitted to the court upon due argument by counsel of the respective parties, and afterwards, to wit, on the — day of ——, 188–, said bill was dismissed and a final judgment issued upon said dismissal in favor of respondent, which said judgment, respondent alleges, was and is a complete determination and settlement of the causes in issue, and forever barred complainant from again asserting the same.

And respondent humbly craves the judgment of this honorable court whether it behooves it to make any other or further answer thereunto than as aforesaid, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

W. T. THORNTON,
Att'y for Respondent.

219 I, W. T. Thornton, the undersigned counsel for said respondent, hereby certify that in my opinion the foregoing pleas are well founded in point of law.

W. T. THORNTON.

TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

Alfred J. Wolf being duly sworn says that he is the agent and attorney-in-fact of the defendant company in the case in which the foregoing pleas are filed; that the said pleas are not interposed for delay, and that they are true in point of fact to the best of his knowledge and belief.

ALFRED J. WOLF.

Subscribed and sworn to before me this fifth day of March, 1887.

R. M. JOHNSON, *Clerk.*

And afterwards, to wit: on March 22nd, 1887, the said complainant, Charles H. Gildersleeve, filed in said clerk's office, his replication to the answer of the said New Mexico Mining Company, which is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Santa Fé.

In the District Court of the First Judicial District in and for said County and Territory.

CHARLES H. GILDERSLEEVE
vs.
THE NEW MEXICO MINING COMPANY *et al.* } Chancery.

The Replication of Charles H. Gildersleeve to the Separate Answer of the Defendant The New Mexico Mining Company.

This repliant, saving and reserving to himself all, and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that he will
220 aver and prove his said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be ready to aver and prove, as this honorable court shall direct, and humbly prays, as in and by his said bill he hath already prayed.

And the said complainant, upon his information and belief further replying to the said answer, specially denies each and every allegation of the said answer setting up, or purporting to set up, the execution and existence of any will or testamentary instrument executed by and between the said Jose Francisco Ortiz and his wife in the said answer named. And this complainant alleges that the said pretended will or testamentary instrument set up in the said answer is not a genuine instrument, but is false, fabricated and fictitious; and that the same was never executed, acknowledge- or ratified by the said Jose Francisco Ortiz, and his said wife, or by either thereof, and is not good or valid in law.

CHARLES H. GILDERSLEEVE.

FISKE & WARREN,
GEO. C. PRESTON &
THOS. SMITH,
Solicitors for Complainant.

Personally appeared before me, Charles H. Gildersleeve, the complainant in the above-named cause, and whose name is subscribed to the foregoing replication, and being duly sworn states that he has read said replication and knows the contents thereof; that the same is true of his own knowledge, except as to the matters
221 which are therein stated to be on his information and belief, and as to those matters, he believes them to be true.

CHARLES H. GILDERSLEEVE.

Subscribed and sworn to before me this 21st day of March, A. D. 1887.

R. M. JOHNSON, *Clerk.*

And afterwards, to wit: on said March 22nd, 1887, said complainant, Charles H. Gildersleeve, filed in said clerk's office his replications to the fourth and fifth pleas of defendant, The New Mexico Mining Company, which are in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

In the District Court of the First Judicial District in and for said County and Territory.

CHARLES H. GILDERSLEEVE
vs.
THE NEW MEXICO MINING COMPANY *et al.* } Chancery.

The Replication of Charles H. Gildersleeve to the Fourth and Fifth Pleas of the said Defendant, The New Mexico Mining Company, Filed to the Bill of Complaint of the Complainant.

This repliant saving and reserving to himself all, and all manner of advantage of exception to the manifold insufficiencies of the said pleas, for replication thereto, saith that he will aver and prove his said bill to be true, certain and sufficient in law to be answered unto, and that the said pleas of the said defendant are uncertain, untrue and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said pleas contained, material or effectual in the *said pleas contained,*
222 *material or effectual in the* law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things, this repliant is and will be ready to aver and prove, as this honorable court shall direct, and humbly prays as in his said bill he hath already prayed.

CHARLES H. GILDERSLEEVE.

FISK & WARREN,
GEO. C. PRESTON &
THOS. SMITH,
Solicitors for Complainant.

And afterwards, to wit, on said 22nd day of March, 1887, said complainant filed in said clerk's office his motion to strike out the first three of said defendant's pleas, which motion is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Santa Fé.

In the District Court of the First Judicial District within and for the said County and Territory.

CHARLES H. GILDERSLEEVE
vs.
THE NEW MEXICO MINING COMPANY *et al.* } Chancery.

Now comes the said complainant, and moves the court to strike out, set aside and overrule the three first several pleas of the said defendant, The New Mexico Mining Company, filed by the said defendant to the bill of complaint in this cause, wherein and whereby the said defendant seeks to set up and interpose as a defense and a bar to said bill the statute of limitations, for the reasons that said pleas are each insufficient, either in law or in equity, to bar or defeat the claims and causes of action as set forth and averred in the said bill of complaint by the said complainant.

And the complainant prays that this motion may be set down for hearing and argument.

FISKE & WARREN,
GEO. C. PRESTON &
THOS. SMITH,
Solicitors for Compl't.

223 And afterwards, to wit: on the ninth day of the regular August, 1887, term of said district court, the same being August 10th, 1887, the following, among other, proceedings were had, to wit:

CHARLES H. GILDERSLEEVE
vs.
THE NEW MEXICO MINING CO. *et al.* } 1865. Chancery.

Come now again the parties by their respective solicitors and the motion of the complainant heretofore filed in this cause, to strike out and set aside the first three several pleas of the defendant, The New Mexico Mining Company, setting up the statute of limitations, coming on for hearing, and disposition, and after arguments of the solicitors, on behalf of the complainants, as well as on the part of the said respondent, and the court being duly advised in the premises, overrules said motion, and refuses to strike out said pleas.

R. A. REEVES,
Judge 1st Jud. Dist.

And afterwards, to wit: on the thirteenth day of the said term last aforesaid, the same being August 15th, 1887, the following, among other proceedings were had, to wit:

EDWARD T. FARISH *et al.*
vs.
THE NEW MEXICO MINING COMPANY *et al.* } 1490, 1865. Chancery.

Now comes Charles H. Gildersleeve by his solicitors, E. A. Fiske and Thomas Smith, Esqs., and it appearing to the court that said Gildersleeve did heretofore, on the 22nd day of December, 1886, file in this cause his amended cross-bill, which appears on the dockets of this court as cause No. 1865, under and in pursuance of the decree and order made in this cause on the 2nd day of July, A. D. 1886,

and it further appearing that the defendant, The New Mexico
224 Mining Company, on the fifth day of March, 1887, filed its several pleas to said amended cross-bill, amongst which were and are two several pleas setting forth and stating that the matters and things set forth in said amended cross-bill had, prior to the filing thereof been finally heard, adjudicated and determined, to which pleas the said Gildersleeve filed his replications, and issue being joined upon said pleas, now comes the said defendant, The New Mexico Mining Company, by its solicitors, Wm. T. Thornton, and E. L. Bartlett, Esqrs., and by consent and agreement of the said solicitors of said Gildersleeve and the said solicitors of said defendant, The New Mexico Mining Company, now made in open court, the issues so formed upon said pleas of former adjudication are submitted to the court for hearing and determination of the facts and law, without the necessity of a reference to a master to take evidence upon such issues.

And after the hearing of the evidence upon such issues and the arguments of the solicitors of the respective parties thereon, the said defendant, The New Mexico Mining Company by its said solicitors filed a motion for a rehearing on, and to set aside and vacate, the order made in this cause on the 2nd day of July, 1886, permitting said Charles H. Gildersleeve to file a petition of intervention in this cause, and under which said Gildersleeve did file his cross-bill herein as above recited; and said Gildersleeve now files his motion to strike out and reject the said motion of said defendant, The New Mexico Mining Company, and after hearing the argument of the solicitors of the respective parties upon said motions, the court overrules the said motion of said New Mexico Mining Company and sustains the motion of said Gildersleeve, and refuses to vacate

and set aside the order and decree entered in this cause on
225 July 2nd, 1886, allowing and permitting said Gildersleeve to intervene in this cause and file his cross-bill as above stated.

And the court being sufficiently advised in the premises, and upon the issues formed upon the pleas of the defendant as to a former adjudication of the matters and things set forth in said cross-bill of said Charles H. Gildersleeve, finds in favor of said Gildersleeve upon such issues, and that the matters and things set forth in said cross-bill have not been heretofore finally adjudicated and determined between said Gildersleeve and said defendant, The New Mexico Mining Company.

And it is ordered and decreed that said pleas of former adjudica-

tion are not a bar to the further prosecution of said amended cross-bill by said Charles H. Gildersleeve.

R. A. REEVES,
Judge 1st Jud. Dist.

And afterwards, to wit: on the same day last aforesaid, the following, among other, proceedings were had, to wit:

ELIAS BREVOORT
vs.
THE NEW MEXICO MINING COMPANY *et al.* } 1865.

On motion of the New Mexico Mining Company by its solicitors, Messrs. Thornton and Bartlett, it is ordered by the court that the clerk of the court have two months after the close of the term in which to copy the record in case No. 1075 offered and used as evidence herein on the question of *res adjudicata*, and by agreement of parties made orally in open court: it is ordered that N. B. Laughlin be and he hereby is appointed special master herein to take the proof, and he is ordered to report the same with his finding thereon to this court.

R. A. REEVES,
Judge 1st Jud. District.

226 And afterwards, to wit: on the 6th day of October, 1887, there was a decree entered in said cause of E. Farish *et al. vs.* The New Mexico Mining Company *et al.*, by said court, at chambers, in vacation, which is in the words and figures following, to wit:

EDWARD T. FARISH *et al.*
vs.
THE NEW MEXICO MINING COMPANY *et al.* } 1490. Chancery.

Now at this day, this cause coming on to be heard upon the order heretofore made on the 30th day of September, extending the time within which the complainants should take testimony in regard to the truth of the record plead in said cause, and the said complainants being present by Francis Downs, Esq., and said respondents by E. L. Bartlett, Esq., and the said Downs stating that he had taken no proof in said matter, and consenting that said case may be heard at this time instead of on the 7th of October, the same came on to be heard upon the motion of the respondents to dismiss said bill of the said complainants, upon the plea of *res adjudicata* plead in bar of said action, which motion is argued by counsel, and the court being fully advised in the premises sustains said motion and orders that said bill of complaint herein be dismissed and that the respondents recover from the said complainants their costs in this behalf expended, to be taxed hereafter; provided, however, that this order shall not prejudice any rights that C. H. Gildersleeve may have acquired as intervenor in this cause or by reason of his cross-bill herein, but the same shall stand as they may now be for the further order of this court.

R. A. REEVES,
Judge First Judicial District.

227 *Ortiz Mine Decision.*

Doc. No. 9—Corr'd list.

Filed in my office this 3rd day of June 1884.

C. M. PHILLIPS, *Clerk.*

(Pages 326, 327, Exhibit A.)

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *November 24th*, 1860.

Decision.

Grant—Ortiz mine.

228 This case was called up for examination on the 10th inst., by counsel for present claimants, was carefully investigated by this office, and arguments heard from counsel.

This grant of a mine is situate about twenty-five miles south of this city in the Oso (Bear) mountain, and called "Santa Rosalia."

The original claimants, Jose Francisco Ortiz and Ignacio Cano, petitioned the 1st alcalde (magistrate) of Santa Fé, Territory of New Mexico, for a grant of registration to this mine, and on the 18th December, 1833, received possession in due course and form of law, according to article fourth, title sixth, Mining Ordinance and the possession was given in the manner provided by title eighth, said ordinance, 2nd, 3rd, 4th and 6th articles, Rockwell, page 57, and said grantees obligating themselves to work it for silver, gold copper or anything else that God may be pleased to grant them.

The parties then in legal form, and in accordance with the provisions of the laws, solicited a grant in accordance with the laws of the waters and commons for the machinery and pasture.

On this petition, the alcalde, in the name of the Mexican nation, granted to said petitioners the Oso springs, and all the commons and pasture grounds within two leagues measured from the mine to the four cardinal points.

There is a certificate of sale by Jose de Jesus Garcia and Rafael Alejo to Francisco Ortiz and Ignacio Cano of a vein of gold, which lies in the centre of the mountain for the sum of one hundred dollars in hand paid.

This is a complete statement of the case, the validity of which is to be now determined.

Was the land of a character to be granted or not? This is clear. The land was public domain, and granted under the several ordi-
nances on the question of mines.

229 Rockwell, vol. 1.

Had the grantor the power to make the grant?

Franciso Baca Ortiz was first alcalde, and therefore had the power to make the grant, this being a judicial matter.

See Rockwell, page 177.

Registry is the basis of a title to a mine, Rockwell, page 173, vol. 1.

This office conceives this to be a complete title, and falls under the treaty of Guadalupe Hidalgo of 2nd February, 1848. Complete, because granted by the proper officer as above stated, and in strict compliance to the mining ordinances, and law on the subject.

In the case of the U. States *vs.* Perchman, Peters' Report, it is held that "the people change their allegiance, their relations to their ancient sovereign are dissolved, but their relations to each other and their rights of property remain undisturbed." These principles are fully sustained in the decision of the Supreme Court reported in 17 Howard, pages 525, 576.

The present claimants, A. Rencher, Elisha Whittelsey, Ferdinand W. Risque, Andrew J. O'Bannon, Charles E. Sherman, N. M. Miller and Thomas J. Walker, received possession by deed from John Grenier and his wife, Laura, and by deed bearing date the 26th December, 1853, the whole of this grant was conveyed to John Greiner.

This office is of opinion that the present claimants have a full and complete title, and therefore approves of this grant, and recommends its final confirmation, to the Congress of United States.

This testimony taken in this case goes to prove the continued occupancy of the land, and the authenticity of the documents relative to the grant.

A. P. WILBAR,
Surveyor General.

230 "R," J. F. B.

1075. File 28.

Testimony of J. Houghton, Samuel Ellison, and Francisco Baca y Ortiz.

Filed in my office this 3rd day of June, 1884.

C. M. PHILLIPS, *Clerk.*

(Pages 329, 330, Exhibit A.)

THE NEW MEXICO MINING COMPANY
vs.
THE UNITED STATES.
} Claim No. 28.

Depositions.

JOAB HOUGHTON, being first duly sworn, upon his oath states:

Question 1st. Please examine document "A," and state in whose possession you found it, and what examination you made of it.

Answer. I found this in the possession of Mariquita Montoya, widow of Jose Francisco Ortiz, at the time of the negotiation which resulted in the purchase of said title from her by John Greiner, being employed as attorney for John Greiner to examine into the

sufficiency of the title. I examined these papers with the view of ascertaining the validity of the title.

Question 2nd. State if any other paper or document accompanied said title which is not now with them, and if so, state what it was.

Answer. There was another paper in addition to these; it was a transfer, written upon one side of a sheet of paper, of Ignacio Cano, conveying all his right, title and interest in the mine referred to in these documents to Jose Francisco Ortiz.

Question 3rd. Please state if document "B" was executed as it purports to have been, and witnessed by you.

231 Answer. It was. The document is in my handwriting, and I obtained the acknowledgment as attorney.

Question fourth. Is the said Mariquita Montoya executing said deed "B" the same person in whose possession title papers "A" were found.

Answer. She is.

Question 5th. Are you acquainted with the handwriting of John Greiner, and if so, is the signature to deed "C" now shown you, his genuine signature?

Answer. I am acquainted with his handwriting, and have often seen him write, and this is his signature.

Question 6th. Where is the property alluded to in these titles situated?

Answer. It is situated in the Placer de Dolores, Santa Fé county, 27 miles, in a southerly direction, from Santa Fé, generally known by the name of Old Placer.

Question 7th. Since the execution of deed "D," in whose possession have the premises mentioned in said deed remained?

Answer. First in the possession of John Greiner, and subsequently in the possession of the New Mexico Mining Co.

Question 8th. Please state what improvements the N. M. Mining Co. have made upon the premises, and what arrangements they have made for working them?

Answer. They have made upon the premises a quartz mill or crushing machine, driven by steam, and other machinery for the purpose of crushing ore and extracting the gold, at a cost of eighteen to twenty thousand dollars, including cost of labor etc.

Question 9th. Have you any interest in this case?

Answer. None.

J. HOUGHTON.

232 Subscribed and sworn to before me this 9th day of November, A. D. 1860.

A. P. WILBAR,
Surveyor General.

FRANCISCO BACA Y ORTIZ, sworn.

Question 1st. Please examine document "A," and state if you are same Francisco Baca y Ortiz who was alcalde in 1833, and executed and delivered document "A."

Answer. I am the same. I executed and delivered a copy which

is paper "A," and went to the mines, and put the parties in possession at the time referred to.

Question 2nd. Who was then governor?

Answer. Manuel Armijo was then military and political chief.

Question 3rd. Were these proceedings transacted by you with the knowledge and approbation of the governor?

Answer. It was done with his knowledge and approbation, and by his order.

FRANCO. BACA Y ORTIZ. [RUBRIC.]

Sworn to and subscribed before me this ninth day of November, A. D. 1860.

A. P. WILBAR,
Surveyor General.

SAMUEL ELLISON, sworn.

Question 1. Examine paper marked "A," now presented to you, and state when it was shown to you, and what examination you made of it.

Answer. I first saw them in 1852 or 1853, and translated them for John Greiner during the negotiation for the purchase of the property mentioned in said documents.

Question 2. Was there with said papers an additional document not now found with them, and if so, state what it was?

Answer. There was a document of transfer from Cano to Ortiz along with said papers, transferring Cano's interest in said property to Ortiz.

SAMUEL ELLISON.

233 Sworn to and subscribed before me this 9th day of November, A. D. 1860.

A. P. WILBAR,
Surveyor General.

"S," J. F. B.

No. 1075.

File 28.

Copy of Tabular Statement of Whittelsey and Others.

Filed in my office this 3rd day of June, 1884.

C. M. PHILLIPS, *Clerk.*

(Pages 332, 333, Exhibit A.)

WASHINGTON, *August 27th*, 1855.

SIR: The present claimants of the Ortiz grant submit for your consideration and decision, the accompanying synopsis of that grant giving the names of the original claimants, names of the present claimants, description of the land, area and nature of claim, etc., all of which is briefly shown in the within tabular statement.

As this claim is clear and full, and all the formalities required by law have been strictly complied with, we request for it your early and favorable consideration.

With great respect, your obedient servants,

A. RENCHER,
ELISHA WHITTELSEY,
FERDINAND W. RISQUE,
ANDREW J. O'BANNON,
CHARLES E. SHERMAN,
N. M. MILLER,
By C. E. SHERMAN, *Att'y-in-fact.*
DAVID WALKER,
Attorney and Representative for Jos. T. Walker.

To William Pelham, Esq., sur. gen'l, Santa Fé, N. M.

234 *Ortiz Mine.*

Names of original claimants.	Names of present cl'm'ts.	Description of land.	Area of grant.	Nature of claim.
Jose Francisco Ortiz and Ignacio Cano.	Elisha Whittelssey, Abraham Rencher, Ferdinand W. Risque, Nathaniel M. Miller, Jos. T. Walker, rep.; Charles E. Sherman, & Andrew J. O'Bannon.	Four leagues square, the mine being in the centre and the boundaries running to the cardinal points.	Sixteen square leagues or about 92,160 acres.	A mining and pastoral grant and also grant for water and agricultureal purposes.

"T," J. F. B.

1075.

Filed in my office this 3rd day of June, 1884.
C. M. PHILLIPS, *Clerk.*

(Page 335, Exhibit A.)

THE NEW MEXICO MINING COMPANY *vs.* THE UNITED STATES. } Petition for Confirmation of Title.

Brief of Claimants.

235 The vendors of the present claimants to the property set forth in document (A) went into the possession and enjoyment of the property therein mentioned on the 19th day of December, 1833.

The title extended at that time was publicly made, paid for and possession taken under it, valuable work and labor done on the property, and the peaceable and quiet possession under said title has continued without interruption from that date up to the present, being a period of twenty-seven years.

It is to be presumed in the absence of proof to the contrary that the grant was made in due form, and by the proper person.

In the capital of New Mexico, under the eye of the public authorities, and relating to property within thirty miles of the capital, it is not natural to suppose that such acts were done by a public officer who had no right or authority to do them, and that his acts were legal and binding is clear and undoubted.

But if the title had been invalid, which we deny, in its original inception, time, under the law of prescription, has vested in the claimants a perfect title.

(See Land Laws of Cal., vol. 2, pp. 734, 739. *Ib.* vol. 1, p. 96.)

Ignacio Cano and his heirs are without title to the grant, even if no sale had ever been made, or transfer executed, by him to Ortiz, for the simple reason that, after ten years' abandonment, any rights which he might have originally acquired became lost and void.

To entitle the claimants to a confirmation of their title, all that is requisite for them to show is that at the date of the treaty of Guadalupe Hidalgo, a legal or equitable interest remained vested in the property in question, and if so, the United States are bound in good faith to uphold and protect it.

236 (Freemont *vs.* The United States, 17 Howard, page 557.)

That such equitable and legal interest both existed at the date of said treaty, there can be no question.

The title in this case is valid, should be confirmed, and recommended to Congress for confirmation.

All of which is respectfully submitted.

J. S. WATTS,
Att'y for Claimants.

"U," J. F. B.

1075, file 28.

JOHN GREINER and WIFE
vs.
ELISHA WHITTELSEY *et al.*

Conveyance.

19 August, 1854.

Filed in my office for record this 20th day of June, A. D. 1873.
SAMUEL ELLISON, *Clerk.*

Filed in my office this 3rd day of June, 1884.
C. M. PHILLIPS, *Clerk.*

This indenture made the nineteenth day of August in the year one thousand eight hundred and fifty-four, between John Greiner, late of the Territory of New Mexico, but at present in Columbus, Ohio, and Laura his wife, of the first part, and Elisha Whittelsey, Charles E. Sherman, Joseph J. Walker and Ferdinand W. Risque,

all of the city of Washington in the District of Columbia,
237 Abraham Rencher of North Carolina, Nathaniel M. Miller of the State of Virginia, and Andrew J. O'Bannon of the same State, of the second part.

Whereas, the said John Greiner, under an agreement dated the 23rd day of August 1853 purchased and acquired the lands, mines and hereditaments in said Territory of New Mexico hereinafter mentioned and described in trust for the said parties hereto of the second part, and also for Samuel F. Vinton and himself, he and they being each interested in one undivided ninth part thereof, and the same have been conveyed to him individually, and are now held by him in trust for them as aforesaid. And whereas the said Vinton hath sold his ninth in said premises unto the said Abraham Rencher and said John Greiner hath also sold one undivided moiety of the one-ninth to which he was entitled under said agreement to said Abraham Rencher and the other moiety of his said ninth to said J. O'Bannon, so that said Rencher is now interested in and entitled to two-ninths and one-half of another ninth, and said O'Bannon in and to one-ninth and one-half of another ninth, now in order to vest the said lands, mines and hereditaments in the said parties hereto of the second part, this indenture witnesseth that in consideration of one dollar current money of the United States to the said parties hereto of the first part in hand paid by the said parties hereto of the second part, at or before the execution of these presents, (the receipt whereof is hereby acknowledged) they the said parties hereto of the first part have given, granted bargained, sold and conveyed and by these presents do give, grant, bargain, sell and convey unto the said parties hereto of the second part, their heirs and assigns as tenants in common, and not as joint tenants, a certain parcel of land, on which is situated a gold mine, known by the name of Santa Rosalia, being in the Real de Dolores
238 in the county of Santa Fé in the said Territory of New Mexico, the vein of the said mine traversing from north to south the mountain called "Oso" and bounded and described as follows to wit: Measuring from east to west under the said vein fifteen varas, measuring south (north?) from the mouth of the mine eighty varas to the southern boundary of the mine formerly known by the name of Santo Nino and now owned by said John Grenier and others and measuring five hundred and twenty varas, also a certain house situated near said mine now occupied by Juan Ortiz as tenant at will, also the Oso spring situated near said house, with all the privileges of the water for watering place and use of machinery in the working of said mine and also right of commons and pasture for the distance of two leagues measuring from the mine to all the cardinal points of the compass, (being the same premises which were conveyed to said John Grenier by Mariquita Montoya, widow and heir of Jose Francisco Ortiz, by deed dated the 26th day of December last, and recorded in book of records of the probate court for said Territory at pages 272, 273 and 274).

And also the undivided fourth part of the following-described real estate lying and being in the said county of Santa Fé and Ter-

ritory aforesaid and near El Placer Viego being a gold mine with the following-described piece or parcel of land to wit: Bounded on the south by the mines of Francisco Ortiz, on the east by a deep hollow or run, on the north and west by a high mountain, being the premises sold and conveyed (the undivided half part) by Thomas Biggs to A. W. Reynolds and Thomas S. J. Johnson by deed dated the 16th day of April A. D. 1850, and which said deed is recorded in the office of the secretary of the Territory, Book B of
Deeds page 239 and one-fourth part of said mine was con-
239 veyed by said Reynolds and Johnson to Francis J. Thomas
by deed bearing date the 29th day of November A. D. 1850, which said deed is also recorded in the office of the secretary of the Territory, Book B, page 259, and to which deeds reference is hereby made for a more full description of said premises (being the same fourth which said Thomas by his deed dated the 13th day of December last conveyed to said John Grenier and which deed is recorded in the book of records for said probate court at pages 259–262,) and also the undivided fourth part of a certain piece or parcel of land situate at the Real de Dolores in the said county of Santa Fé on which is a gold mine known as the mine of "Polvedera" or "Oro Menuda" at the mouth of the cañon in the Real de Dolores aforesaid, together with all the rights privileges and appurtenances to the one-fourth part of said land and gold mine belonging, the said described premises being the same of which an undivided half part was conveyed by Stephen Davenport to A. W. Reynolds and said Thomas, by deed dated the 16th of July, A. D. 1850, which deed is recorded in the office of the secretary of said Territory, Book B of Deeds, page 244, and to which reference is hereby made for a more full description of said property, (and being the same which said Thomas, by his attorney, J. Houghton, conveyed to said Grenier by deed, dated the 29th of the December last recorded in the Book of Records of said probate court at pages 277, 278 and 279,) and also all the right, title and interest under any law of the United States or of New Mexico, or otherwise, of the said John Grenier in and to that parcel of land containing one hundred and sixty acres, near the village of Las Truches, in the county of Rio Arriba, in
said Territory of New Mexico, taken possession of by said
240 John Grenier, and enclosed and built on and now in the pos-
session of Juan Dario Corrales, under an agreement with said Grenier, dated the 10th of December last, and being the same premises which are referred to in an official declaration made by Juan de la Cruz Montoya, Manuel Vigil and Jose Ignacio Cruz, before Nicolas Montoya, together with all the right, members and appurtenances to the said several tracts of land, mines and hereditaments belonging or appertaining.

To have and to hold the same and every of them, and every part thereof, unto the said parties hereto of the second part, as aforesaid, in the shares and proportions following, that is to say: As to one undivided ninth part thereof, unto and to the use of Elisha Whittelsy, his heirs and assigns forever; as to two undivided ninth parts and one undivided moiety of another ninth part thereof, unto and

to the use of the said Abraham Rencher, his heirs and assigns forever; as to one other undivided ninth part thereof, unto and for the use of the — Ferdinand W. Risque, his heirs and assigns forever; as to one other undivided ninth part thereof, unto and to the use of Nathaniel M. Miller, his heirs and assigns forever; as to one other undivided ninth part thereof, unto and to the use of the said Joseph J. Walker, his heirs and assigns forever; as to one other undivided ninth part thereof, unto and to the use of the said Charles E. Sherman, his heirs and assigns forever, and as — the remaining undivided ninth part thereof and one undivided moiety of another ninth part thereof, unto and to the use of the said Andrew J. O'Bannon, his heirs and assigns forever; and the said John Grenier doth hereby, for himself, his heirs, executors and administrators, covenant and agree with the said parties hereto of the second part, their heirs and assigns, to warrant and forever defend the said
241 lands, mines and premises, and every of them and every part thereof, with the appurtenances, by these presents, unto the said parties hereto of the second part, their heirs and assigns, against all persons whomsoever claiming or to claim by, from, through or under him, and that he and his said wife and all such persons shall and will, at all times hereafter, at the request and cost of the said parties hereto of the second part, their heirs or assigns, make, do and execute all such further and other acts and deeds as shall be deemed necessary the better and more effectually to convey the said lands, mines and premises unto them as aforesaid.

In witness whereof the said parties hereto of the first part have hereunto set their hands and seals, the day and year first above written.

JOHN GRENIER. [SEAL.]
LAURA GRENIER. [SEAL.]

Signed, sealed and delivered by said John Greiner in the presence of (the date in the thirteenth line of the first page and the words "widow and heir of Jose Francisco Ortiz" between the 27th and 28th lines of the second page being previously made and altered)—
WILLIAM MINER.
LEVERETT MINER.

Signed, sealed and delivered by the said Laura Greiner in the presence of—
SALLY SMITH.
MARIA WILLEY.

Be it remembered that on this 19th day of August in the year one thousand eight hundred and fifty-four personally appears Laura the wife of John Greiner party to the foregoing deed before me, William Miner, clerk of the circuit court of the United States 7th circuit and district of Ohio (personally known to me to be the
242 person whose name appears signed to the said deed) and acknowledged the same to be her act and deed and being by me privately examined apart from and out of the presence and hearing of her husband, whether she doth make her acknowledgd-

ment of the same willingly and freely and without being induced thereto by fear or threat of, or ill-usage by her husband or fear of his displeasure acknowledges that she doth act freely and the said John Greiner also acknowledged the same to be his act and deed for the purposes therein mentioned.

Taken and certified by and before me at the city of Columbus in the district of Ohio aforesaid on the day and year above named.

In testimony whereof I have hereunto set my name, and affixed the seal of said court at the time and place mentioned.

WILLIAM MINER, *Clerk.*

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

I, the undersigned clerk of the probate court in and for the county of Santa Fé in the Territory of New Mexico and *ex officio* recorder for said county do hereby certify that the foregoing deed of conveyance has been recorded in Book Letter (G) pages 197, 198, 199 and 200 kept in my office for such purpose.

In testimony whereof I have hereunto set my hand and the seal of said court at Santa Fé, N. M., this 21st day of June A. D. 1873.

[SEAL.] SAMUEL ELLISON,
Clerk Probate Court.

243 "V," J. F. B.

No. 1075, file 28.

THE NEW MEXICO MINING CO. }
vs.
THE UNITED STATES. }

(*Petition.*)

Filed in my office this 3rd day of Jun-, 1884.

C. M. PHILLIPS, *Clerk.*

J. S. WATTS,
Att'y for Claimants.

(Pages 341, 342, Exhibit A.)

SANTA FÉ, *Nov.* 8, 1860.

To the Hon. A. P. Wilbar, surveyor general of the Territory of New Mexico:

Your petitioners would most respectfully state to you that during the year 1855, they filed in the office of the surveyor general of New Mexico a statement dated at Washington city August 27th, 1855, setting forth their names, the description of the lands granted, the area of the grant, and the nature of the claim as will appear by reference to said paper now on file, and marked as Exhibit "D."

Your petitioners further state that at the same time they also filed as evidence of their title the original grant marked as Exhibit (A) also a deed of conveyance from Mariquita Montoya to John Gre-

nier for the lands aforesaid, marked as Exhibit (B) herein, and also a deed of conveyance from the said John Grenier to your petitioners to the lands aforesaid, marked as Exhibit (C) herein.

Your petitioners further state that under and by virtue of an act of the Legislative Assembly of New Mexico, approved February the 1st, 1858, the said petitioneres were made and constituted a corporation and body politic under the name and style of the "New
244 Mexico Mining Company," and as such, are entitled to sue and be sued.

Your petitioners further state that the grant now claimed by and set forth in document (A) was made as far back as the year 1833, was made as stated in the said document to Jose Francisco Ortiz and Ignacio Cano.

Your petitioners further state that on the 19th day of September, 1833, the said Jose Francisco Ortiz and Ignacio Cano purchased upon the same tract of land a mine of Jose de Jesus Garcia, and Rafael Alejo, as will appear by reference to said document (A).

Your petitioner- further state that after going into the possession of and working said mines for a short time, the said Ignacio Cano became dissatisfied and sold all his interest in the said mines and lands to the said Jose Francisco Ortiz, and was paid in full for the same, and said land and mines continued in the possession and occupancy of the said Jose Francisco Ortiz until his death.

Your petitioners further state that the said Jose Francisco Ortiz at his death, left no issue or collateral relatives, and the said property was inherited by his wife, the said Maraquita Montoya, who deeded the same to John Grenier, who deeded the same to your petitioners.

Your petitioners further state that there was a written transfer by Ignacio Cano to Jose Francisco Ortiz, of the right, title and interest of the said Cano to the grant of lands and mines in document (A) mentioned, but by some accident said transfer has been lost or mislaid.

Your petitioners further state that since the year 1833, the said property has remained in the quiet and peaceable possession of the said Jose Francisco Ortiz, the said Maraquita Montoya and
245 your petitioners, and no adverse title exists to said lands and mines known to your petitioners.

Yous petitioners further state that the lands and mines were purchased by them with the view of working them extensively, and to develop the mineral resources of the country, and they have gone to an expense of some twenty thousand dollars in the purchase and erection of the machinery requisite for successful mining, and your petitioners in order that they may not be disturbed or molested in the prosecution of their business, ask that their title be examined and approved, and forwarded to Congress for final confirmation.

Your petitioners further state that said lands and mines are situate in Santa Fé county.

Your petitioners further state that at the date of the treaty of Guadalupe Hidalgo, the said grant was held, occupied and claimed by the said vendors of your petitioners as property, and whether

the title was perfect or imperfect, legal or equitable, the right to a recognition and confirmation of the rights of your petitioners is clear and undoubted.

All of which is respectfully submitted.

JOHN S. WATTS,
Att'y for Petitioners.

246 Citizen first alcalde:

The citizens, Jose Francisco Ortiz and Ignacio Cano, residents of this mining town, appear before you in due form and say:

That in the name of the Mexican nation, which may God preserve, they register a new vein which is in the Oso mountains, in the rear of a compromise mine to the west, its direction run-
247 ning across from north to south, to which we give the name of Sta. Rosalia, and we promise to work it for silver, gold and copper, or whatever God may please to grant us, and we pray that you may be pleased to provide for this petition in accordance with the ordinances on mining.

We swear that this is not done in fraud, but is what is necessary, etc., etc.

Real de Dolores, November 15, 1833.

JOSE FRANCISCO ORTIZ.
IGNACIO CANO.

SANTA FÉ, *November* 29, 1833.

The appearers, in compliance with article 4th of title six of the mining ordinance, shall give to the mine a shaft of one and a half varas at the orifice by ten varas in depth, and furnish immediate notice of the fact in order that I may proceed to give them the possession and title prescribed by said article, the registry of which they make of said mine in due form by the present application being admitted as of full validity.

BACA Y ORTIZ.

To the constitutional alcalde:

Jose Francisco Ortiz and Ignacio Cano, both residents of Real de los Dolores, and discoverers of the mine Santa Rosalia, before you in due form, appear and say:

That having fully complied with your decree of the 29th of the past, and also complied with the provisions set down for the workers of mines, in the fourth article of the sixth title of the mining ordinance, we request, as therein directed, that you be pleased to repair to said mine and give us due possession in accordance with said ordinance. We swear, etc., etc.

Real de los Dolores, December 16, 1833.

JOSE FRANCISCO ORTIZ.
IGNACIO CANO.

248 SANTA FÉ, *December* 18, 1833.

In conformity with the foregoing application and the provisions of article fourth, title sixth, of the mining ordinance, as well as of those of article first of said title, and of all others that treat of pos-

session, let witnesses and an expert (none existing officially in this Territory) be appointed from among those who may with greater fitness discharge such duties, in order that, accompanied by them, I may proceed to give the possession solicited, in the manner provided by title eighth of the said ordinance, in its second, third, fourth and sixth articles. Thus have I provided, ordered and signed, with my assistant-, with whom I act as receiver, *and* default of a notary public, there being none in this place. I certify.

FRANCISCO BACA Y ORTIZ.

Assistant: MANUEL DELGADO.
Assistant: DOLORES JALOMA.

Real de los Dolores, December 18, 1833.

In furtherance of the provisions of the preceding decree I, the aforesaid first alcalde of the city of Santa Fé, and its jurisdiction, do appoint an expert for the present possession, Sor. de Demaso Lopez in order that acting up to the provision of article fourth of title sixth of the mining ordinance referred to, he may discharge his duty in accordance with said law. Thus have I provided, ordered and signed in presence of my assistants, which I hereby certify.

FRANCISCO BACA Y ORTIZ.

MANUEL DELGADO.
Assa.: DOLORES JALOMA.

Thereupon, in furtherance of the aforementioned decree, I directed
D. Damaso Lopez to appear before me, and acquainted him
249 with his appointment as expert in the present possession, and
upon hearing thereof he did say that he accepted and does accept the said appointment, of which he declared he would discharge the duties to the extent of his abilities, signing this with me and my assistants, which I hereby certify.

FRANCISCO BACA Y ORTIZ.

DAMASO LOPEZ, *Ass't.*
MANUEL DELGADO,.*Ass't.*
D-LORES JALOMA, *Ass't.*

There being no public notary in this Territory, and in order to give greater and fuller effect to the law in the premises, I appointed, in compliance with the last clause of article fourth of title sixth, the citizens Marcelino Abreu and Nestor Armijo as my assistant witnesses, having made them at the same time appear before me, the former acting in the capacity of scribe to acquaint them with this provision, they, after accepting the said appointment, declared that they would discharge its duties in the best possible manner, subscribing with me and with those procured for my assistance.

FRANCISCO BACA Y ORTIZ.

Assistant: MANUEL DELGADO.
Assistant: DOLORES JALOMA.
Assistant: MARCELINO ABREU.
Assistant: NESTOR ARMIJO.

Immediately and in furtherance of the foregoing proceedings, I, the aforesaid alcalde, the witnesses, the expert and the assistants, being present for the purpose of carrying out the last clause of article fourth of title six of the mining ordinance, caused said appointee, expert, De Demaso Lopez, to identify and examine the mine, Santa Rosalia, of which citizens Jose Francisco Ortiz and Ignacio Cano were ready to take possession in the name of
250 the Mexican nation, and he having so done, it appeared that the shaft of said mine was ten varas in depth, a yard and a half in width or diameter at the orifice, one and seven-eighths varas in the declivity or slope of the ten varas, with which, in conformity with the standard of article seventh, title eight, of said ordinance, tallied one hundred and two varas square, which were distributed in the manner following: for the bottom of the vein to the east on the slope of the creek, fifteen varas, and for the top of the same to the west, eighty-seven varas. Thereupon I, with my assistants and the expert, proceeded to put the parties interested in possession of the three continuous dependencies conceded to them by article first of the sixth title referred to, measuring out to them on the north from the orifice of the mine eighty varas, sufficient to form a boundary fronting the south from the mine of Santo Nino, which Dolores Jaloma & Co. are working and in a southern direction five hundred and twenty varas, which added to the eighty varas already mentioned, make up the six hundred of the three dependencies which accrue to them as discoverers. This formality being closed, the parties represented that in virtue of their right and the provisions of law, formally they ask to be invested in conformity with those laws, with the privilege of necessary water supplies and issues for the working of machinery and the pasturage of the cattle that are to work upon the farm or farms of the mine of which they have been put in possession, this possession being as it should be according to law and justice, without any detriment to third persons, and for the purpose of only avoiding the injury which might be caused to the mine by the stock, sheep or cattle of the farmers of this or any other Territory.

Considering the justice of their claim to the commons, and
251 the waters already mentioned, and seeing that they are granted to them by the laws themselves as appears by article third of title thirteen of the mining ordinance, I, the aforesaid alcalde, in compliance therewith, and in the name of the august Mexican nation grant to them, as water supplies to work their machinery, the Oxo spring, contiguous to D. Jose Francisco Ortiz, dwelling as well as other springs which may be included within the limits of the commons which may be granted to them in the direction of the east and as pasture commons, two leagues for each of the four cardinal points of the mine.

This grant being made and possession being given as aforesaid, we walked through the open space of the mine, and I caused the parties interested to throw stones in every direction, in token of possession, stakes were driven down, and the necessary landmarks set up, a copy of the present proceedings was furnished them to

serve as title for their immunities, as is provided, according to the ordinance, my assistants, the expert, and the party subscribing this with me, which I hereby certify.

FRANCISCO BACA ORTIZ.

Assistant: MARCELINO ABREU.
Assistant: NESTOR ARMIJO.
Expert: DAMASO LOPEZ.
JOSE FRANCISCO ORTIZ AND IGNACIO CANO.

Real de los Dolores, December 18th, 1833.

In compliance with the last portion of the foregoing proceedings, let an exemplified and authenticated copy of all that has been done, faithfully and lawfully made out, be furnished to citizens Jose Francisco Ortiz and Ignacio Cano for their satisfaction and security.

Thus did I decree, order and subscribe in presence of my assistants, which I certify.

FRANCISCO BACA ORTIZ.

Ass't: MARCELINO ABREU.
Ass't: NESTOR ARMIJO.

252 NOTE.—The present proceedings are concluded on four and a half lawful pages which shall be filed in the first justice's office under my charge, and in due testimony whereof, I appended this note, with my rubric attached.

——— ———. [RUBRIC.]

Fees for those of possession, patent and writings, twenty-five dollars. Charge for paper, four reals and nine grains. Traveling expense of the alcalde, going and returning, twenty dollars. Those of the expert and of the assistant witnesses, nine dollars. Totals of fees four and fifty dollars. I swear to it.

——— ———. [RUBRIC.]

The foregoing is a copy of the original, faithfully and lawfully drawn up, legalized, authenticated and revised, in the presence of myself and of my assistant witnesses, which I certify.

Real de los Dolores, December 19th, 1833.

(Signed) FRANCISCO BACA Y ORTIZ. [RUBRIC.]

Fees, written paper and signatures $6.00. I swear.

——— ———. [RUBRIC.]

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

I, John Henry Mink, clerk of the probate court in and for this county of Santa Fé, certify that the foregoing copies and certificate *is* registered in the book of record kept for such purpose in this office.

In testimony whereof, not having a seal of office, my hand and scroll, in Santa Fé, this 29th day of December, 1853.

J. H. MINK, *Clerk.* [SCROLL.]

Be it known by the present document to have sold to D. Jose Francisco Ortiz, a lieutenant of the active militia, in charge
253 of this mining town, and to D. Ignacio Cano, a resident of this Territory, a vein of gold, which lies in the centre of the mountain in the rear of the said town, in consideration of which was delivered to me in cash the sum of one hundred dollars, and in order that they may use it, as its lawful purchasers and possessors and possess over said vein their rights and due power, I give the present document of sale, at the aforesaid mining town of Dolores on the 18th day of the month of September, 1833, at the request of the vendors, Jose de Jesus Garcia and Rafael Alejo. I subscribed as witness, they affixing their sign of the cross.

JOSE DE JESUS GARCIA.
x
RAFAEL ALEJO.
x

As witness:
JOAQUIN SOMOHANO.

(Translation.)

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

I, John Henry Mink, clerk of the court of probate in and for the county of Santa Fé, certify that this deed of sale is copied in the registry of lands, page 264, kept for the purpose in this office.

Given under my hand, not having a seal of office, this 28th day of December, 1853.

J. H. MINK, *Cl'k.* [SCROLL.]

To the citizen first constitutional justice:

Jose Francisco Ortiz and Ignacio Cano, both with ample right to the gold mine, which they have discovered, within the precincts of the Oso, and which they have in legal form denounced, ap-
254 pear before you as the proper authority and say that said mine being ten varas in depth, as prescribed by the mining regulations, and they having moreover, complied with each and all of the requirements laid down in said regulation, you will be pleased, after the necessary formalities, to put them in legal possession of said mine and its dependencies, since thus doing, is in subservience of the laws, and fulfillment of that justice for which we apply.

We swear, &c.

Santa Fé, 14th of November, 1833.

Further Proceedings.

We transmit herewith the specimen stones in conformity with said regulations.

(Translation.)

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

I, John Henry Mink, clerk of the probate court of Santa Fé county, certify that I have copied the foregoing document in the Land Record, pages 264 and 265, kept for that purpose in this office under my charge.

In testimony whereof, having no seal of office, witness my name and sign manual, — Santa Fé, the 28th day of December, 1853.

J. H. MINK, *Clerk.*

Surveyor general's office, translator's department.

SANTA FÉ, N. M., *November 24th*, 1860.

The foregoing is a correct translation from the original Spanish on file in this office.

J. HOWE WATTS, *Translator.*

"Z," J. F. B.

255

SPECIAL MASTER'S OFFICE,
SANTA FÉ, N. M., *August 2nd*, 1888.

This day Charles H. Gildersleeve, Esq., solicitor for complainant, appeared before the special master and filed his objections to the special master's report, which objections are as follows to wit:

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

In the District Court of Santa Fé County.

CHARLES H. GILDERSLEEVE
vs.
THE NEW MEXICO MINING COMPANY *et al.* } 1865. Chancery.

The objections of Charles H. Gildersleeve, complainant in cross-bill, to the draft of the report of N. B. Laughlin, special master in the above-entitled cause.

1. The said complainant objects to so much of said report as finds that Maraquita Montoya, widow of Jose Francisco Ortiz, on or about the twenty sixth day of December, 1853, conveyed the property in controversy in this cause or any part thereof to John Geiner for the reason that there is no legal or sufficient evidence to support such finding.

2. Said complainant objects to so much of said report as finds that John Greiner and his wife, Laura, on or about the 19th day of August, 1854, conveyed the lands and property in controversy in this action, or any portion thereof to Elisha Whittelsy, Charles E. Sherman, Joseph T. Walker, Ferdinand W. Risque, Abraham Rencher, Nathaniel M. Miller, and Andrew J. O'Bannon, because there is no legal or sufficient evidence to support such finding.

256 3. Said complainant objects to so much of said report as finds that on or about the 16th day of July, 1864, Charles E. Sherman, Louis S. Coryell and John L. Kidnell conveyed the property in this cause, or any portion thereof, to the respondent, The New Mexico Mining Company, for the reason that there is no legal or sufficient evidence upon which to base such finding, and because the said Coryell and Kidnell nor either of them are shown by the evidence before said master to have had or held any title to any portion of said property.

4. Said complainant objects to so much of said report as finds that on the 20th day of January, 1880, the New Mexico Mining Company conveyed the property in controversy in this cause or any portion thereof to Stephen B. Elkins and Jerome B. Chaffee for the reason that there is no legal or sufficient evidence to support such findings.

5. Said complainant objects to so much of said report as finds that on the 14th day of April, 1884, Stephen B. Elkins and Jerome B. Chaffee conveyed the property in controversy in this cause, or any portion thereof to the New Mexico Mining Company, because there is no legal or sufficient evidence to support such findings.

6. Said complainant objects to so much of said report as finds that the loss of the original deeds from Maraquita Montoya to John Greiner; from John Greiner and wife to Charles E. Sherman and others; from Charles E. Sherman and others to the New Mexico Mining Company and from the New Mexico Mining Company to Stephen B. Elkins and Jerome B. Chaffee has been sufficiently proven, and that certified copies of such deeds should be re-
257 ceived in evidence for the reason that the evidence introduced before said master to establish the loss of such deeds, and account for the non-production of said original deeds is not sufficient to establish such loss, or to account for the absence of said deeds so as to permit the introduction of secondary evidence as to the contents of such deeds.

7. Said complainant objects to so much of said report as finds that Maraquita Montoya, widow of Jose Francisco Ortiz, after the death of said Ortiz, took possession of the property in controversy in this cause, or any portion thereof, for the reason that there is no legal or sufficient evidence upon which to base such findings.

8. Said complainant objects to so much of said report as finds that John Greiner took possession of the property in this action or any portion thereof, on the 26th day of December, 1853, and that he and all his assigns held actual, open and notorious possession of said property from that day until the date of the filing of complainant's cross-bill in this suit, because there is no sufficient or legal evidence upon which to base such finding, and because the evidence before such master and his finding shows that during all of said time, other persons besides said Greiner and his assigns were in the actual possession of portions of said property claiming to be the owners thereof, and because the report of said master states that the evidence before him does not show that the respondents or their

grantors were in actual possession of said property from January 28th to July 11, 1884.

9. Said complainant objects to so much of said report as finds that the chain of title is sufficient to vest in the New Mexico Mining Company a fee-simple title to the property in question, if the original grantee, Maraquita Montoya, widow of Jose Francisco Ortiz, had a perfect title, for the reason that there is no legal or
258 sufficient evidence upon which to base such a finding, and because such finding is contrary to the evidence before said master.

10. Said complainant objects to so much of the report, findings and conclusions of law of said master, as finds and states that Maraquita Montoya, widow of Jose Francisco Ortiz, at the death of said Ortiz, as such widow, became vested with the title to one-half, or some other part or portion of the property in controversy in this cause, for the reason that such finding and conclusion is not supported by the law and the evidence, and because such conclusion is contrary to the laws in force at the date of the death of said Jose Francisco Ortiz.

11. Said complainant objects to so much of said report, findings and conclusions of law of said master as finds and states that the action of the complainant is barred by the statute of limitation of the Territory of New Mexico, and that complainant's cross-bill should be dismissed for the reason that under the evidence before said master, and the facts found by him, the action of complainant is not barred by the statute of limitation, and for the reason that under such facts, the statute of limitation did not begin to run until the issuance of the patent to the New Mexico Mining Company, May 20th, 1876, which was less than ten years prior to the filing of complainant's cross-bill, and for the reason that no statute of the Territory of New Mexico limiting the commencement of actions is applicable to grants of lands made by the government of Mexico until the Government of the United States shall have finally settled and determined the character, extent and location of such grants, and shall have issued patents for the lands covered thereby; and for the reason that the deeds under which respondents claim, do not sufficiently describe and identify the lands, claimed to
259 have been held adversely to complainant, and because the evidence does not show that said respondents entered into the possession of said property under any deed or deeds purporting to convey a title or state in fee-simple to said property, or that said respondents or their grantors have had or held exclusive possession of any particular part or portion of the property in controversy for the space of ten years next before the filing of complainant's cross-bill.

C. H. GILDERSLEEVE.
FISKE & WARREN.
THOMAS SMITH.
Sol's for Comp't.

Santa Fé, N. M., August 7th, 1888.

N. B. LAUGHLIN,
Special Master.

SPECIAL MASTER'S OFFICE.

This day William T. Thornton, Esq., solicitor for the respondents, appeared before the special master, and filed his objections to the special master's report, which objections are as follows, to wit:

TERRITORY OF NEW MEXICO,
County of Santa Fé.

In the District Court of the First Judicial District, Sitting within and for the County of Santa Fé for Hearing of Causes Arising under the Laws of the Territory.

CHARLES H. GILDERSLEEVE, Complainant,
vs.
NEW MEXICO MINING COMPANY *et al.*, Respondents. } No. 1865.

Respondents' objections to the findings of facts and conclusions of law in the draft of report of N. B. Laughlin, special master in the above-entitled cause.

The respondents object to the draft of said report:

260 First. Because said special master failed to find as a matter of fact that at the time of the execution of the will of Jose Francisco Ortiz, in 1841, and at the time of his death, in 1848, and at no time prior thereto, had there been in the Territory of New Mexico an officer known and designated as a notary public or scribe.

Second. Because the master failed to find that in the absence of such a notary, a custom existed in the Territory of New Mexico, in 1848, and had existed there for more than ten years prior thereto, for open or non-cupative wills, to be executed before a judge of the first instance, and two witnesses, and that this was the general custom of the country at this time, and so universal as to become law.

Third. Because said master did not find that the instrument offered in *advance* as the mutual will of Jose Francisco Ortiz and his wife, was their last will and testaments, made and executed by them according to the custom, and in the manner, such instruments were executed.

Fourth. Because the master erred in holding that in the absence of a will, the wife of Jose Francisco Ortiz was one of his heirs, and inherited a portion of his property.

Fifth. Because said master failed to find upon the question of *res adjudicata*, and to determine said issue, in favor of respondents.

Sixth. Because said master fails to pass upon the issue of champerty raised by respondents, and to find that the consideration of the deeds of the various parties who conveyed to Elias Brevoort, and of the deed from Brevoort to complainant, were made when the grantors were out of possession of the premises conveyed and

261 with a view of having legal proceedings instituted to recover said premises, and that the consideration was for legal services and to pay the expenses and the costs of said litigation.

Seventh. Because said master failed to find whether the question in issue in the cross-bills of Brevoort and Gildersleeve, in any —

affected the issues raised in the case of Farish *et al. vs.* New Mexico Mining Company *et al.*, and was a proper subject of a cross-bill, and did not find as a matter of fact that they were improperly brought, first as not being germain to the issue in the original suit, and second, as having been filed without the consent of the chancellor first had and obtained.

Eighth. Because said master erred in not finding the statute of limitations began to run from the time Maraquita Montoya entered into possession of the premises in 1848.

Ninth. Because said master erred in not finding that the statute of limitations began to run from the date of the confirmation of the grant by the United States Congress, and not from the date of the survey.

W. T. THORNTON,
E. L. BARTLETT,
Sol's for Respondent.
N. B. LAUGHLIN,
Special Master.

Santa Fé, N. M., August 8th, 1888.

262 And afterwards, to wit, on the 25th of August, 1888, said respondents filed in said clerk's office their exceptions to the report of said master, which said exceptions are in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

In the District Court of the First Judicial District, Sitting within and for the County of Santa Fé for Hearing of Causes Arising under the Laws of the Territory.

CHARLES H. GILDERSLEEVE, Complainant,
vs.
NEW MEXICO MINING COMPANY *et al.*, Respondents. } No. 1865.

Respondents' exceptions to the findings of facts and conclusions of law in the report of N. B. Laughlin, special master in the above-entitled cause.

The respondents objects to the said report:

First. Because said special master failed to find as a matter of fact that at the time of the execution of the will of Jose
263 Francisco Ortiz, in 1841, and at the time of his death, in 1848, and at no time prior thereto, had there been in the Territory of New Mexico an officer known and designated as a notary public or scribe.

Second. Because the master failed to find that in the absence of such a notary, a custom existed in the Territory of New Mexico, in 1848, and had existed there for more than ten years prior thereto, for open or non-cupative wills, to be executed before a judge of the

first instance, and two witnesses, and that this was a general custom of the country at this time, and so universal as to become law.

Third. Because said master did not find that the instrument offered in evidence as the mutual will of Jose Francisco Ortiz and his wife was their last will and testament made and executed by them according to the custom, and in the manner, such instruments were executed.

Fourth. Because said master erred in holding that in the absence of a will, the wife of Jose Francisco Ortiz was one of his heirs, and inherited a portion of his property.

Fifth. Because said master failed to find upon the question of *res adjudicata*, to determine said issue, in favor of the respondent.

Sixth. Because said master fails to pass upon the issue of champerty raised by respondents, and to find that the consideration of the deeds of the various parties who conveyed to Elias Brevoort, and of the deed from Brevoort to complainant, were made when the grantors were out of possession of the premises conveyed and with a view of having legal proceedings instituted to recover said premises, and that the consideration was for legal services and to pay the expenses and the costs of said litigation.

264 Seventh. Because said master failed to find whether the question in issue in the cross-bills of Brevoort and Gildersleeve, in any way affected the issue raised in the case of Farish *et al. vs.* New Mexico Mining Company *et al.*, and was a proper subject of a cross-bill, and did not find as a matter of fact that they were improperly brought, first, as not being germain to the issue in the original suit, and second, as having been filed without the consent of the chancellor first had and obtained.

Eighth. Because said master erred in not finding that the statute of limitations began to run from the time Mariquita Montoya entered into possession of the premises in 1848.

Ninth. Because said master erred in not finding that the statute of limitations began to run from the date of the confirmation of the grant by the United States Congress, and not from the date of the survey.

Tenth. Because the said master failed to amend the draft of his report, and overruled respondents' exceptions thereto, and because his findings of facts and conclusions of law are erroneous, except as to his finding of fact and conclusion of limitations.

Eleventh. Because said master failed to find that the statutes of limitation began to run upon the death of Jose Francisco Ortiz when his widow took possession thereof, claiming the same in her own right.

W. T. THORNTON &
E. L. BARTLETT,
Sol's for Respondents.

And afterwards, to wit: on the 28th day of August, 1888, said complainant filed in said clerk's office his exceptions to said master's report, which exceptions are in the words and figures following, to wit:

265 TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

In the District Court of Santa Fé County.

CHARLES H. GILDERSLEEVE
v.
THE NEW MEXICO MINING COMPANY *et al.* } No. 1865. Chancery.

The Exceptions of Charles H. Gildersleeve, Complainant in Cross-bill, to the Report of N. B. Laughlin, Special Master in the Above-named Cause.

1. The said complainant excepts to so much of said report as finds that Mariquita Montoya, widow of Jose Francisco Ortiz, on or about the twenty-sixth day of December, 1863, conveyed the property in controversy in this cause, or any portion thereof, to John Greiner, for the reason that there is no legal or sufficient evidence to support such finding.

2. Said complainant excepts to so much of said report as finds that John Greiner and his wife, Laura, on or about the 19th day of August, 1854, conveyed the lands and property in controversy in this action, or any portion thereof, to Elisha Whittelsey, Charles E. Sherman, Joseph T. Walker, Ferdinand W. Risque, Abraham Rencher, Nathaniel M. Miller and Andrew J. O'Bannon, because there is no legal or sufficient evidence to support such finding.

3. Said complainant excepts to so much of said report as finds that on or about the 16th day of July, 1864, Charles E. Sherman, Louis S. Coryell, and John L. Kidwell, conveyed the property in question in this cause or any portion thereof to the respondent, The New Mexico Mining Company, for the reason that there is no legal or sufficient evidence upon which to base such findings, and
266 because the said Coryell and Kidwell, nor either of them are shown by the evidence before said master to have had or held any title to any portion of said property.

4. Said complainant excepts to so much of said report as finds that on the 20th day of January, 1880, the New Mexico Mining Company conveyed the property in controversy in this cause or any portion thereof to Stephen B. Elkins and Jerome B. Chaffee for the reason that there is no legal or sufficient evidence to support such findings.

5. Said complainant excepts to so much of said report as finds that on the 14th day of April, 1884, Stephen B. Elkins and Jerome B. Chaffee conveyed the property in controversy in this cause, or any portion thereof, to the New Mexico Mining Company, because there is no legal or sufficient evidence to support such finding.

6. Said complainant excepts to so much of said report as finds that the loss of the original deeds from Maraquita Montoya to John Greiner; from John Greiner and wife to Charles E. Sherman and others; from Charles E. Sherman and others to the New Mexico Mining Company, and from the New Mexico Mining Company to

Stephen B. Elkins and Jerome B. Chaffee has been sufficiently proven, and that certified copies of such deeds should be received in evidence, for the reason that the evidence introduced before said master to establish the loss of such deeds and to account for the non-production of said original deeds is not sufficient to establish such loss, or to account for the absence of said deeds so as to permit the introduction of secondary evidence as to the contents of said deeds.

7. Said complainant excepts to so much of said report as finds that Maraquita Montoya, widow of Jose Francisco Ortiz, after
267 the death of said Ortiz took possession of the property in controversy in this cause or any portion thereof, for the reason that there is no legal or sufficient evidence upon which to base such finding.

8. Said complainant excepts to so much of said report as finds that John Greiner took possession of the property in controversy in this action, or any portion thereof, on the 26th day of December, 1853, and that he and all his assigns held actual, open and notorious possession of said property from that day until the date of the filing of complainant's cross-bill in this suit, because there is no legal or sufficient evidence upon which to base such finding, and because the evidence before such master and his report shows that during all of said time, other persons besides said Greiner and his assigns were in the actual possession of portions of said property, claiming to be the owners thereof, and because the report of said master states that the evidence before him does not show that the respondents or their grantors were in actual possession of said property from January 28th, 1884, to July 11, 1884.

9. Said complainant excepts to so much of said report as finds that the chain of title is sufficient to vest in the New Mexico Mining Company a fee-simple title to the property in question, if the original grantee, Maraquita Montoya, widow of Jose Francisco Ortiz, had a perfect title, for the reason that there is no legal or sufficient evidence upon which to base such a finding, and because such finding is contrary to the evidence before said master.

10. Said complainant excepts to so much of said report, finding and conclusions of law of said master, as finds and states that Maraquita Montoya, widow of Jose Francisco Ortiz, at the death of said Ortiz, as such widow, became vested with the title to one-half
268 or some other part or portion of the property in controversy in this cause, for the reason that such finding and conclusion is not supported by the law and the evidence, and because such con-lusion is contrary to the laws in force at the date of the death of said Jose Francisco Ortiz.

11. The said complainant excepts to so much of said report, findings and conclusions of law of said master, as finds and states that the action of the complainant is barred by the statute of limitations of the Territory of New Mexico, and that complainant's cross-bill should be dismissed for the reason that under the evidence before said master, and the facts found by him, the action of complainant is not barred by the statute of limitations, and for the reason

that under such facts, the statute of limitations did not begin to run until the issuance of the patent to the New Mexico Mining Company May 20th, 1876, which was less than ten years prior to the filing of complainant's cross-bill, and for the reason that no statute of the Territory of New Mexico, limiting the commencement of actions is applicable to grants of lands made by the government of Mexico, until the Government of the United States shall have finally settled and determined the character, extent and location of such grants, and shall have issued patents for the lands covered thereby, and for the reason that the deeds under which respondents claim do not sufficiently describe and identify the lands claimed to have been held adversely to complainant and because the evidence does not show that said respondents entered into possession of said property under a deed or deeds purporting to convey a title or estate in fee-simple to said property, or that said respondents or their grantors have had or held exclusive possession of any particular part or portion of the property in controversy for the space of ten
269 years next before the filing of complainant's cross-bill.

And for the reasons aforesaid said complainant prays that his said exceptions may be sustained.

C. H. GILDERSLEEVE,
E. A. FISKE,
H. L. WARREN &
THOS. SMITH,
Solicitors for Complainant.

And afterwards, to wit: on the twenty-sixth day of December, 1888, at chambers, in vacation, the following final decree in said cause was made and entered of record, to wit:

In the District Court of the First Judicial District, at Chambers, in Vacation.

CHARLES H. GILDERSLEEVE, Complainant,
vs.
NEW MEXICO MINING COMPANY *et al.*, Respondents. } No. 1865. Chancery.

This cause coming on to be heard upon the exceptions to the report of the special master, filed by the complainant as well as those filed by the respondents and after having heard H. Burns, Esq., for the complainant and W. T. Thornton, for the respondents, and being fully informed upon the subject, it is ordered and decreed that the finding of the special master upon the plea of statute of limitations be and the same hereby is affirmed, and that complainant's exception thereto be overruled, and that respondent's exception to the question of the validity of the will be sustained, and the master's finding thereon be overruled, it being hereby found and determined that the will of Jose Francisco Ortiz offered in evidence by respondents was a valid and legal will, and conveyed the interest

of Jose Francisco Ortiz to the premises in question to his
270 widow Mariquita Montoya, from whom the title was conveyed by mesne conveyances to the respondent, The New Mexico Mining Company.

It is further ordered and determined that the complainant's cause of action is barred by the statute of limitations.

It is therefore ordered, considered and decreed that the said complainant take nothing by his bill, and that the same be and hereby is dismissed.

And now comes the complainant and moves the court to tax to the respondents all costs made and incurred herein upon the issue formed and the trial had thereon upon the plea filed by respondents setting up a former adjudication of the matters involved in this action and the court having heard counsel and being advised therein sustains said motion, and it is ordered by the court that because upon the trial of the issue formed upon said plea, the same was found and decided in favor of complainant, and not upon the account of any bad faith on the part of respondent- in filing such plea, all costs made and incurred by reason of the filing of such plea and the trial of the issue formed thereon be taxed to respondents.

It is further ordered that Napoleon B. Laughlin, Esq., the special master herein, be allowed for his services the sum of seventeen hundred and fifty dollars ($1,750) to be paid by the complainant.

It is also ordered that Frank Delgado be allowed the sum of ten dollars for his services as stenographer on the hearing as to the master's allowance, the same to be taxed as costs.

It is further ordered and decreed that the respondents recover of the complainant their costs herein laid out and expended, except
271 the costs herein otherwise taxed to respondent-, and it is ordered that if the costs taxed herein, as well as the master's fee, be not paid within twenty days from the date of this decree, that execution may issue therefor as in other cases.

And now comes the complainant and files a petition for a rehearing herein.

Dated this December 26th, 1888.

R. A. REEVES,
Associate Justice, &c.

272 And afterwards, to wit, on the 27th day of September, 1890, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors; which said assignment of errors is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO:

In the Supreme Court.

CHARLES H. GILDERSLEEVE, Plaintiff in Error, *vs.* THE NEW MEXICO MINING COMPANY *et al.*, Defendants in Error.	No. 409. Error to the District Court, Santa Fé County.

Assignment of Errors.

Comes now the plaintiff in error in the above-named cause and says that there is manifest error in the record, proceedings, and decree in said cause in this, to wit:

1st. Error committed by the district court of Santa Fé county in overruling the exceptions filed by the plaintiff in error to the report of the special master in chancery made and filed in said cause.

2nd. Error committed by said district court in sustaining the exceptions of the respondents in error filed to the report of the special master in chancery in said cause.

3rd. Error committed by said district court in holding and decreeing that the bill of complaint and cause of action of the plaintiff in error was and is barred by the statute of limitations, and in overruling the exceptions of the plaintiff in error to so much of the report of the special master in chancery in said cause as found that the bill of complaint and cause of action of the plaintiff in error was barred by the statute of limitations.

4th. Error committed by the said district court in holding and decreeing that the will of Jose Francisco Ortiz offered in evidence by the defendants in error was a valid and legal will and conveyed the interest of Jose Francisco Ortiz to the premises in question to his widow, Mariquita Montoya, and in sustaining the exceptions of the defendants in error to so much of the report of the special master in chancery in said cause as held that said will was invalid and did not convey the interest of Jose Francisco Ortiz to the premises in question to his widow, Mariquita Montoya.

5th. Error committed by said district court in holding and deciding that the evidence introduced before the special master in chancery in said cause and reported by said master to said court, as to the title and claim of the defendants in error to the property
273 in controversy, was competent and legal evidence, and was sufficient to invest the title of said property in said defendants in error.

6th. Error committed by said district court in dismissing the bill of complaint of the plaintiff in error and in failing and refusing to render a decree in favor of the plaintiff in error in accordance with the prayer of said bill.

7th. Error committed by said district court in overruling the motion of the plaintiff in error to strike out, set aside, and overrule the three first several pleas of the defendant in error, The New Mexico Mining Company, as set forth on pages 222 and 223 of the printed record of this cause.

Wherefore the plaintiff in error prays that the decree of the said district court may be in all things annulled, set aside, and reversed.

H. L. WARREN,
E. A. FISKE,
GEORGE C. PRESTON,
THOMAS SMITH,
Solicitors for Plaintiff in Error.

Now come the above-named def'ts in error and join in error and say there is no error in the record and decree herein.

By W. T. THORNTON &
EDWARD L. BARTLETT,
Solicitors for Def'ts in Error.

And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the first Monday of January, 1891, on the third day of said term, the same being Wednesday, January 7th, 1891, the following, among other, proceeddings were had, to wit:

CHARLES H. GILDERSLEEVE, Pl'ff in Error,
vs.
THE NEW MEXICO MINING COMPANY *et al.*,
Def'ts in Error.
} 409. Error to Santa Fé County.

This cause, coming on for argument upon the record, additional record, assignment of errors, and briefs filed herein, is argued by Mr. Burns, Mr. Preston, and Mr. Fiske in behalf of said plaintiff in error, and by Mr. Bartlett in behalf of said defendant- in error, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, at the regular term of said court last aforesaid, on the twenty-sixth day thereof, the same being
274 Friday, July 24th, 1891, the following, among other, proceedings were had to wit:

CHARLES H. GILDERSLEEVE, Pl'ff in Error,
vs.
THE NEW MEXICO MINING COMPANY *et al.*,
Def'ts in Error.
} 409. Error to District Court of Santa Fé County.

This cause having been argued by counsel and submitted to and taken under advisement by the court at a former day of the present term, the court, being now sufficiently advised in the premises, announces its decision by Chief Justice O'Brien, affirming the decree of the court below for reasons stated in the opinion now filed, Associate Justices Seeds, Lee, and McFie concurring. It is therefore ordered, adjudged, and decreed that the decree of the district court in this cause in and for the county of Santa Fé, whence this cause came into this court, be, and the same hereby is, affirmed, and that

in accordance therewith said bill of complaint be, and the same hereby is, dismissed, and that said defendants in error recover of said plaintiff in error their costs in this behalf expended, to be taxed, and that they have execution therefor.

And afterwards, to wit, on the 25th day of July, 1891, there was filed in the office of the clerk of said supreme court a motion for a rehearing; which said motion is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, Adjourned January Term, 1891, from the First Judicial District Court, County of Santa Fé.

CHARLES H. GILDERSLEEVE, Pl'ff in Error, *vs.* THE NEW MEXICO MINING COMPANY *et al.*, Def'ts in Error.	Chancery for Partition. No. 409.

Now comes the complainant in the above-entitled cause, by his attorneys, and moves the court to grant him a rehearing in the above-entitled cause, because the court in considering the statute of limitations set up by defendant overlooked and failed fully to consider the following matters:

1st. That the wife of Ortiz sold only her interest of one-half of the claim in controversy, and that therefore the claimants under the wife of Ortiz were tenants in common with complainant Gildersleeve and their possession of the land in controversy was a possession of the said complainant and his grantors.

2nd. That defendants, by submitting to the jurisdiction of the Land Department of the United States, by applying for and accepting a survey and patent for the grant, were estopped from denying their admissions in and the adjudication of the jurisdiction to which they thus voluntarily submitted their case.

275 3rd. That defendants admitted in their answer and pleadings in this case that they claim title to the property in controversy and that such title was vested solely in and by the patent issued on behalf of the United States.

4th. That a confirmatory act of Congress purporting to grant a title to the confirmee, in which the boundaries are undefined and uncertain, cannot ever be a grant *in presenti.*

5th. That the confirmation admittedly vesting title when the tract confirmed is segregated from the public domain by survey can never so vest title as to bind either the United States or the confirmee until there shall have been *as* official survey made and finally approved by the Government of the United States; that the deputy United States surveyor as well as the surveyor general of New Mexico have no power finally to approve a survey of such a confirmed tract of land, and that the only officers who can finally approve such a survey are the Commissioner of the General Land Office, with the right of appeal to the Secretary of the Interior,

whose decision is final and binds both the Government and the individual.

6th. That the grant in this cause was more than undefined, its boundaries being not only uncertain but unintelligible, as appears by the evidence in this cause.

7th. That the evidence in this cause shows that there was no final approval of the survey of the land in controversy until the issue of patent therefor, less than ten years before the suit in this case was brought.

8th. That no act of the legislature of New Mexico could by limitation or otherwise affect the title of the United States in this tract of land until such title vested in the United States.

And in support of this motion complainant respectfully asks leave to file brief with points and authorities.

EUGENE A. FISKE,
Solicitor for Complainant.

And afterwards, at the regular term of said supreme court last aforesaid, on the twenty-seventh day thereof, the same being
276 Saturday, July 25th, A. D. 1891, the following, among other, proceedings were had, to wit:

CHARLES H. GILDERSLEEVE, Pl'ff in Error,
vs.
THE NEW MEXICO MINING COMPANY *et al.*, Def'ts in Error.
} 409. Error to District Court of Santa Fé County.

Now comes said plaintiff in error, by his solicitor, E. A. Fiske, Esq., and files his motion for a rehearing of this cause, and said defendants in error come by their solicitor, E. L. Bartlett, Esq., and present to the court their motion for the taxing of the costs in this cause, and by agreement of the said parties by their respective solicitors it is ordered by the court that said two motions stand continued until the next term of this court.

And afterwards, at a regular term of the supreme court of the Territory of New Mexico begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the last Monday of July, A. D. 1891, on the twenty-second day of said term, the same being Friday, August 21st, 1891, the following, among other, proceedings were had, to wit:

CHARLES H. GILDERSLEEVE, Pl'ff in Error,
vs.
NEW MEXICO MINING CO. *et al.*, Def'ts in Error.
} 409. Error to District Court of Santa Fé County.

The motion of said plaintiff in error for a rehearing of this cause having been submitted to and taken under advisement by the court upon a former day of the present term, the court, being now sufficiently advised in the premises, denies said motion. It is therefore ordered by the court that said motion be, and the same hereby is, denied.

And afterwards, to wit, on the 4th day of January, 1892, there was filed in the office of the clerk of the supreme court of New Mexico an application for appeal to the Supreme Court of the United States; which said application is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1891.

CHARLES H. GILDERSLEEVE, Plaintiff in Error,
vs.
THE NEW MEXICO MINING COMPANY, Defendant in Error. } No. 409. Chancery.

Comes now Charles H. Gildersleeve, the plaintiff in error in the above-named cause, and prays the court to grant him an appeal from the decree and decision rendered in said cause at the present term of this court to the Supreme Court of the United States,
277 and said plaintiff in error also prays that this court may fix the amount of the bond that he shall execute on taking such appeal.

CHARLES H. GILDERSLEEVE,
Plaintiff in Error.

And afterwards, to wit, on the 4th day of January, 1892, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an affidavit as to amount in controversy; which said affidavit is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1891.

CHARLES H. GILDERSLEEVE, Plaintiff in Error,
vs.
THE NEW MEXICO MINING COMPANY, Defendant in Error. } No. 409. Chancery.

Charles H. Gildersleeve, the plaintiff in error in the above-named cause, being duly sworn, upon his oath states that the matter in dispute, exclusive of costs, in the above named and entitled cause, exceeds the sum of five thousand dollars.

CHARLES H. GILDERSLEEVE.

Subscribed and sworn to before me this 4th day of January, 1892.

H. S. CLANCY, *Clerk.*

And afterwards, at the regular term of said supreme court of New Mexico last aforesaid on the twenty-fifth day thereof, the same being Wednesday, January 6th, 1892, the following, among other, proceedings were had, to wit:

CHARLES H. GILDERSLEEVE, Pl'ff in Error,
vs.
NEW MEXICO MINING COMPANY *et al.*, Def'ts in Error.
} 409. Error to District Court of Santa Fé County.

Comes now Charles H. Gildersleeve, the plaintiff in error, by his counsel, and files his application praying for an appeal from the decree and decision rendered and given in this cause at the present term of this court to the Supreme Court of the United States, and the court, being duly advised in the premises, grants the prayer of such application and allows such appeal, and upon the further motion of such plaintiff in error it is ordered by the court that upon the taking of such appeal said plaintiff in error shall make and execute his bond in the penal sum of one thousand dollars, payable to the defendant in error and conditioned as required by law and the rules of the Supreme Court of the United States, and with surety to be approved by the clerk of this court. The said plaintiff in error also presents and files his affidavit showing that the matter in dispute in this cause exceeds the sum of five thousand dol-
278 lars, exclusive of costs; and this court now, in accordance with the provisions of the statute of the United States, makes and certifies a statement of the facts found to be proven and established by the evidence and record in said cause, which statement shall be certified to the Supreme Court of the United States as a part of the record instead of the evidence at large. Such statement at this time made and certified to shall take the place of and be in lieu of what purports to be a statement of facts filed in this cause with the clerk of this court on the 21st day of August, 1891, which latter statement shall be omitted from the record of this cause and shall not be considered a part of the same.

And afterwards, to wit, on the 6th day of January, A. D. 1892, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a statement of facts in said cause; which said statement is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1891.

CHARLES H. GILDERSLEEVE, Plaintiff in Error,
vs.
THE NEW MEXICO MINING COMPANY, Defendant in Error.
} 409. Chancery.

The plaintiff in error in the above-entitled cause having prayed this court for an appeal from the decree and decision of this court to the Supreme Court of the United States and having also prayed that this court shall make a finding and statement of facts in accordance with the statutes of the United States to be transmitted to the Supreme Court of the United States on such appeal, this court does now make and certify that the facts shown and established by

the record in this cause and upon which the decree and decision of this court is founded and based are as follows:

1. That Jose Francisco Ortiz, deceased, the person through whom both complainants and respondents claim title
279 & 280 to the property and lands in controversy, and Ignacio Cano, deceased, did, on the fifteenth day of November 1833, register a new vein, which is in the Oso mountain direction north and south, which they promised to work for gold, silver and copper, and named the new vein "Santa Rosalia;" that on the 29th day of November, 1833, said Ortiz and Cano were ordered by Francisco Baca y Ortiz, first constitutional alcalde of Santa Fé, to sink upon said mine or new vein, a shaft one and one-half varas at the orifice, by ten varas in depth, so as to comply with the mining ordinances in force at that time, in order that the said Baca y Ortiz might proceed to give the said Jose Francisco Ortiz and Ignacio Cano the possession and title to said mine as prescribed by the said ordinances.

The register of said mine being admitted as valid by the said alcalde on the said day and year aforesaid.

That on the 16th day of December, 1833, the said Jose Francisco Ortiz and Ignacio Cano petitioned the said alcalde to repair to the said new vein or mine, and to give to them the possession of the same, in accordance with the law then in force, and stated in the said petition that they had fully complied with the order or decree of the said alcalde, made on the 29th day of November, 1833. That in pursuance of said petition, and in compliance with the mining laws in the rubric of mines then in force under the Mexican government, the said alcalde, accompanied by an expert and his assistant, proceeded to place the said Jose Francisco Ortiz and Ignacio Cano in possession of the said new vein or mine, on the 18th day of December, 1833; that on the day and year last aforesaid, it appearing to the said alcalde that the said Jose Francisco Ortiz and Ignacio Cano were ready to take possession of the said mine,
281 and it also appearing from the examination of the expert appointed by said alcalde on the day last aforesaid, that the shaft of said mine was one and a half varas in width or diameter at the mouth or orifice, and one and seven-eighths varas in the slope or declivity of ten varas, with which, in conformity with the standard of article seventy, title eight of said mining ordinance, tallied one hundred and two varas square, which the said alcalde described as follows, to wit:

For the bottom of the vein to the east on the slope of the creek, fifteen varas, and for the top of the vein to the west, eighty-seven varas, and the said alcalde thereupon, with his assistant and expert, proceeded to put and did put the said Jose Francisco Ortiz and Ignacio Cano into possession of three continuous dependencies, conceded to them by article first of title six of the said mining ordinances, as discoverers, measuring out to them on the north from the mouth of the said mine, eighty varas, sufficient to form a boundary fronting the south from the mine of Santo Niño, which was then worked by Dolores Palomo and Co., in the southern direc-

tion, five hundred and twenty varas, which added to the eighty varas already mentioned, make up the six hundred of the said three dependencies, which accrued to them; that immediately thereafter, upon the representation of the said Jose Francisco Ortiz and Ignacio Cano that they were entitled by the laws then in force to have granted to, and vested in, them the privilege of the necessary water supplies and uses for the working of machinery, and the pasturage of cattle that were to work on the farm or farms in which they had been placed in possession, and upon the formal request of the said Jose Francisco Ortiz and Ignacio Cano, to be placed in such possession, the said alcalde granted to them as common two leagues
282 for each of the four cardinal points of the mine, together with the Oso spring, and all other springs included within the limits of the lands granted to them in the direction of the east, and as pasture, commons, two leagues as aforesaid; that thereupon the said Jose Francisco Ortiz and Ignacio Cano formally took possession of the said mine and grant; that afterwards, to wit: on the twenty-ninth day of December, 1853, the documents relating to said registration and grant were recorded in the office of the probate clerk of Santa Fé county in the Territory of New Mexico.

II. That the mine and grant in question is known and designated in the Department of Lands at Washington, D. C., and in the surveyor general's office at Santa Fé, New Mexico, as private land claim No. 43 and known as the Ortiz Mine grant, and is situated in Santa Fé county and Territory of New Mexico, and is in the jurisdiction of this court.

III. That some time prior to the inception of the hostilities between the United States and the Republic of Mexico, which resulted in the cession of New Mexico to the United States, under the treaty executed at the city of Guadalupe Hidalgo on the second day of February, 1848, that the said Ignacio Cano sold, transferred and conveyed all his right, title, and interest in and to the said mine and grant and premises in question for a valuable consideration to Jose Francisco Ortiz, and that from and after the transfer of said Ignacio Cano to said Jose Francisco Ortiz, that said Ortiz was then in possession and remained in continuous and uninterrupted
283 possession of the Santa Rosalia mine and all privileges, water rights, rights to the commons so granted to the said Ortiz and Cano by the Mexican nation as aforesaid up to the time of his death.

IV. That on the twenty-second day of July, 1848, the said Jose Francisco Ortiz died at Santa Fé, county of Santa Fé, Territory of New Mexico, without heirs, either ascendant or descendant; that the said Jose Francisco Ortiz had only one brother whose name was Jose Ignacio Ortiz, who died some time prior to the death of said Jose Francisco Ortiz; that said Jose Ignacio Ortiz was married and left surviving him seven children, whose names were Estefana Ortiz, Ramona Ortiz, Prudencia Ortiz, Macedonia Ortiz, Abran Ortiz, Merejildo Ortiz, and Jose Maria Ortiz. That the said Jose Maria Ortiz was married and died about twenty years ago leaving no issue. That Abran Ortiz went to California about thirty-two years ago, and

has not been heard of directly since then; that Macedonia Ortiz married Antonio Abran Romero about twenty-five years ago, and she and her husband are still alive; that Estefana and Merejildo Ortiz are still alive. That said Jose Ignacio Ortiz died about forty years ago, and his wife died about thirteen years ago. That Jose Francisco Ortiz left surviving him an only sister whose name was Maria de la Luz Ortiz; that said Maria de la Luz Ortiz married one Manuel Sanchez; that they both are dead; that she died about twenty years ago, and left them surviving five children named respectively, Domingo Sanches, Ignacio Sanches, Erineo Sanches, Esmerejildo Sanches and Rosario Sanches; that these five children were all the heirs left of the marriage of said Maria de la Luz and her husband, Manuel Sanches; that Rosario Sanches married one Rafael Romero. That said Rosario Sanches died about twenty-
284 two or twenty-three years ago, and left her surviving only one child, whose name was Josefa Romero. That said Josefa Romero married one Jesus Garcia about twenty years ago. That said Josefa and her husband are still living.

V. That on the second day of May, 1873 Antonio Abran Romero and his wife Macedonia Ortis, by deed, conveyed all their right title and interest in and to the property and lands in question in this suit to Elias Brevoort, executed by them and acknowledged before Jose Dolores Romero, one of the justices of the peace in and for the county of San Miguel in this Territory, on the day and year last aforesaid, and that the said conveyance was on the 12th day of May, 1873, recorded in the office of the probate clerk of Santa Fé county, Territory aforesaid.

That on the second day of May, 1873, Esmerijildo Ortiz and Prudencia Ortiz, his wife, conveyed all their right, title and interest in and to the property and lands in question in this suit to Elias Brevoort by deed of conveyance executed and acknowledged by them before Jose Dolores Romero, one of the justices of the peace in and for the county of San Miguel in this Territory on the day and year aforesaid, and that the said conveyance was on the 12th day of May, 1873, recorded in the office of the probate clerk of Santa Fé, Territory aforesaid.

That on the 2nd day of May, 1873, Ramona Ortiz conveyed all her right, title and interest to the property and lands in controversy in this suit to Elias Brevoort by deed of conveyance executed and acknowledged by her before Jose Dolores Romero, one of the
285 justices of the peace in and for the county of San Miguel in this Territory on the day and year last mentioned, and that the said conveyance was, on the 12th day of May, 1873, recorded in the office of the probate clerk of Santa Fé county, Territory aforesaid.

That on the 2nd day of May, 1873, Prudencia Ortiz conveyed all her right, title and interest in and to the property and lands in question in this suit to Elias Brevoort by deed of conveyance executed and acknowledged by her before Jose Dolores Romero, one of the justices of the peace in and for the county of San Miguel in this Ter-itory, on the day and year last aforesaid, and that the said con-

veyance was on the 12th day of May, 1873, recorded in the office of the probate clerk of Santa Fé county, in the said Territory.

That on the 3rd day of May 1873, Ignacio Sanches, Inez Gonzales, his wife, conveyed all their right, title and interest in and to the property and lands in question in this suit to Elias Brevoort by deed of conveyance executed and acknowledged by them before Jose Dolores Romero, one of the justices of the peace in and for the county of San Miguel in this Territory, on the day and year last aforesaid, and that the said conveyance was, on the 12th day of May, 1873, recorded in the office of the probate clerk of Santa Fé county, Territory of New Mexico aforesaid.

That on the 7th day of May, 1873, Esmerejildo Sanches and Abelina Sanches, his wife, conveyed all their right, title and interest in and to the property and lands in question in this suit to Elias Brevoort by deed of conveyance, and executed and acknowledged
286 by them before Rafael Gallegos, one of the justices of the peace in and for the county of Santa Ana, in this Territory, on the day and year last aforesaid, and that the said conveyance was, on the 12th day of May, 1873, recorded in the office of the probate clerk of Santa Fé county, Territory of New Mexico.

That on the 8th day of May, 1873, Estefana Ortiz conveyed all her right, title and interest in and to the said property and lands in question in this suit to Elias Brevoort by deed of conveyance executed and acknowledged by her before Samuel Ellison, clerk of the probate court in and for the county of Santa Fé in this Territory on the day and year last aforesaid, and that the said conveyance was, on the 12th day of May, 1873, recorded in the office of the probate clerk of Santa Fé county, Territory of New Mexico.

That on the 30th day of May, 1873, Hereneo Sanches and Octaviana Romero his wife, conveyed all their right, title and interest in and to the property and lands in question in this suit to Elias Brevoort by deed of conveyance executed and acknowledge- by them before J. M. Gallegos, one of the justices of the peace in and for the county of San Miguel in this Territory, on the 30th day of May, 1873, and that the said conveyance was on the 2nd day of June, 1873, recorded in the office of the probate clerk of Santa Fé county Territory of New Mexico.

That on the 30th day of May, 1873, Jesus Garcia and Josefa Romero, his wife, conveyed all their right, title and interest
287 in and to the property in question in this suit to Elias Brevoort by deed of conveyance executed and acknowledged by them before Jose M. Gallegos, one of the justices of the peace in and for the county of San Miguel in this Territory on the 30th day of June, 1873, and that the said conveyance was on the second day of June, 1873, recorded in the office of the probate clerk of Santa Fé county, Territory of New Mexico.

That on the fifth day of May, A. D. 1873, Domingo Sanches and Francisca Gonzales, his wife, conveyed all their right, title and interest in and to the property and lands in question in this suit to Elias Brevoort, by deed of conveyance executed and acknowledged by them before Feliciano Montoya, one of the justices of the peace

in and for the county of Santa Ana, in this Territory, on the 10th day of June, 1873, and that the said conveyance was, on the 4th day of June, 1873, recorded in the office of the probate clerk of Santa Fé county, Territory of New Mexico.

That on the 30th day of June, 1880, Elias Brevoort conveyed all his right, title and interest in and to an undivided one-half interest of all the property and lands in controversy in this suit, to Charles H. Gildersleeve and John H. Knaebel, by deed of conveyance, executed and acknowledged by him before F. W. Clancy, clerk of the first judicial district court for Santa Fé county in this Territory on the 1st day of July, 1880, and in pursuance of a certain contract, in writing, made on the said 30th day of June 1880, between said Brevoort of the first part and the said Gildersleeve and Knaebel of the second part; and that said conveyance was, on the 3rd day of September, 1885, filed for record in the office of the probate clerk in the county of Santa Fé, Territory of New Mexico.

288 That on the 7th day of July, 1886, John Knaebel conveyed all his right, title and interest in and to the property and lands in question in this suit to Elias Brevoort by a deed of conveyance executed and acknowledged by him before W. M. Berger, a notary public in and for the county of Santa Fé in this Territory, on the 8th day of July, 1886, and that the said conveyance was, on the 9th day of July 1886, recorded in the office of the probate clerk in the county of Santa Fé, Territory of New Mexico.

That on the 8th day of July, 1886, Elias Brevoort conveyed all his right, title and interest in and to the property and lands in question in this suit to The New Mexico Mining Company, the respondents herein, by deed of conveyance executed and acknowledged by him before John H. Vaughn, a notary public in and for the county of Santa Fé in this Territory on the 8th day of July, 1886, and that said deed was on the 9th day of July, 1886, recorded in the office of the probate clerk of Santa Fé county, New Mexico.

VI. That said Jose Francisco Ortiz was married some time prior to the year 1841; that his wife's name was Maria Ynez Montoya; that she was commonly called and known as Maraquita Montoya, and that said Maraquita Montoya died during the month of December, 1870.

VII. That on the 15th day of August, 1841, the said Jose Francisco Ortiz and his wife, Maria Ynez Montoya, appeared before J. Albino Chacon, constitutional alcalde, and by operation of

289 law, a judge of the first instance of the department of New Mexico at Santa Fé, its capital, and Francisco Ortiz y Baca, and Joaquin Yomohano were attending witnesses, who were both personally known to the said alcalde, J. Albino Chacon, as he certified, and that they made and executed a mutual will, by which they attempted to make the one surviving the other the devisee or heir-at-law to all the property of the deceased, both real and personal, of every kind whatsoever, they having no children or forced heirs then living; that they, the said Jose Francisco Ortiz and Maria Ynez Montoya, signed and executed the said will before the said alcalde Chacon and his attending witness; that the signature of

Jose Francisco Ortiz set to the said will is his true and genuine signature, and that the signature of Maria Inez Montoya set to the said will is her true and genuine signature, some one having written her name for her, and she having set her cross thereto, as was customary for people not knowing how to write to do at that time; that the said Maria Inez Montoya did not know how to, and was unable to, write; that the signature of the said J. Albino Chacon set to said will is his true and genuine signature; that Francisco Baca y Ortiz and Joaquin Yomohano witnessed the signatures of Jose Francisco Ortiz and his wife, and that the signature of the said Francisco Baca y Ortiz set to said will is his true and genuine signature; that the signature of Joaquin Yomohano set to said will is his true and genuine signature.

VIII. That at the time the said will was made, the said Jose Francisco Ortiz was a soldier in active service in the Mexican army, with the rank of lieutenant, acting as captain; that afterwards
290 he was appointed to a captaincy, and acted as such until about the month of August, 1846, at the time the American troops under General Kearney captured Santa Fé; that at this time Jose Francisco Ortiz severed his connection with the Mexican army and became a civilian, and remained as such until his death, July 22nd, 1848.

IX. That the said mutual will was in the possession of Maraquita Montoya, wife of said Jose Francisco Ortiz until the latter part of the year 1855, when Francisco Hinojos, a witness in behalf of the respondents in this cause and niece of said Maraquita Montoya came to Santa Fé to live with her aunt; that said Maraquita requested witness to look through a package of papers belonging to said Maraquita for a mutual last will between herself and her late husband; that the said Francisca Hinojos did look through the papers and found among them the original will (a copy and translation of which is introduced herein by respondents and marked Exhibit B. N. B. L.) That the original will was shown the witness, Francisca Hinojos, and she identified it as being the same paper she found in 1855 among the papers of her aunt, Maraquita Montoya, wrapped up in a small bag, that witness read said paper to said Maraquita and she said that that was the one and requested witness to take particular care of it; that the said will remained in the possession of Francisca Hinojos from that time to the year 1873; that in the year 1874 said Francisca Hinojos delivered the said will to Antonio Ortiz y Salazar, a witness for respondents in this case, to be by him delivered to Stephen B. Elkins; that said Elkins was then the legal representative of the New Mexico Mining Company;
291 that said Elkins paid said Francisca Hinojos one thousand dollars for said will as a consideration; that said Francisca Hinojos inherited all the property of her said aunt, Maraquita Montoya; that said Francisca Hinojos lived with her aunt Maraquita from 1855 to the time of her death, in December, 1870.

X. That the said will was never proved or admitted to probate as the last will of either Jose Francisco Ortiz, his wife Maria Inez Montoya, or any one else.

XI. That the said Maraquita Montoya after the death of Jose Francisco Ortiz, her husband, took possession of the property known as the Santa Rosalia mine, a certain house situated near the said mine, also the Oso spring, situated near the said house, and all the privileges of water for watering place and use of machinery in the working of said mine and also the right of commons and pasture for the distance of two leagues measuring from the Ortiz orifice of the mine to all the cardinal points of the compass, being described as follows, viz:

"Give, grant, bargain and sell and convey unto the said John Greiner, his heirs and assigns, a certain parcel of land, on which a gold mine, known by the name of Santa Rosalia is situated in the Real de Dolores in the county of Santa Fé aforesaid, the vein of said mine traversing from north to south of the mountain called the 'Oso,' and bounded and described as follows, to wit: Measuring from east to west under the said vein, fifteen varas, measuring south from the mouth of the mine, eighty varas to the south-
292 ern boundary of the mine, formerly known by the name of 'Santo Niño,' and now owned by said Greiner and others, measuring five hundred and twenty varas, also a certain house situated near the said mine now occupied by Juan Ortiz as tenant at will; also the Oso spring, situated near said house with all the privileges of the water for watering place, and use of machinery in the working of said mine, and also right of commons and pasture for the distance of two leagues measuring from the mine to all the cardinal points of the compass, being the same right to the interest and privileges conveyed according to the mining laws of the Republic of Mexico by Francisco Baca y Ortiz, first alcalde of the district of Santa Fé to Jose Francisco Ortiz and Ignacio Cano, under date of the nineteenth day of December, 1833."

And that she held continuously possession of the same until the 26th day of December, 1853, when she conveyed the said lands and property above described in controversy in this suit to John Greiner by deed of conveyance executed by her on the day and year last aforesaid, and acknowledged by her before Louis D. Shutz, clerk of the first judicial district court of the Territory of New Mexico on the same day, which deed of conveyance was recorded in the office of the probate clerk of Santa Fé county on the 29th day of December, 1853.

XII. That the said John Greiner and his wife, Lora, conveyed said lands and property so conveyed to him by Maraquita to Elisha Whittelsey, Charles E. Sherman, Joseph T. Walker, Ferdinand W. Risque, Abraham Rencher, Nathaniel W. Miller, and Andrew J. O'Bannon by deed of conveyance dated and executed on the
293 19th day of August, 1854, and acknowledged by the said Greiner and wife before the clerk of the circuit court of the United States seventh circuit and district of Ohio, on the day and year last aforesaid, as tenants in common and not as joint tenants in proportion as follows:

"To have and to hold the same and every of them and every part thereof unto the said parties hereto, of the second part as aforesaid,

in the shares and proportions following, that is to say: As to one undivided ninth part thereof, unto and to the use of Elisha Whittlesey, his heirs and assigns forever, as to two undivided ninth parts thereof, and one undivided moiety of another undivided ninth part thereof, unto and to the use of the said Abraham Rencher, his heirs and assigns forever; as to one other undivided ninth part thereof unto and to the use of Ferdinand W. Risque, his heirs and assigns forever; as to one other undivided one-ninth part thereof unto and to the use of Nathaniel M. Miller, his heirs and assigns forever; as to one other undivided ninth part thereof unto and to the use of the said Joseph T. Walker, his heirs and assigns forever; as to one other undivided ninth part thereof unto and to the use of the said Charles E. Sherman, his heirs and assigns forever, and as to the remaining one undivided ninth part thereof, and one undivided moeity of another ninth part thereof, unto and to the use of the said Andrew J. O'Bannon, his heirs and assigns forever; that the said deed of conveyance was recorded in the probate clerk's office, Santa Fé county, Territory aforesaid, on the 21st day of June, 1873.

That, by evidence offered by respondents over the objection of complainant, a copy of a deed certified to as being a true copy as shown by the records by the probate clerk of Santa Fé county,
294 this Territory, which deed of conveyance was made by Charles E. Sherman, Louis S. Coryell, as parties of the first part, John L. Kendell as party of the second part and the New Mexico Mining Company as party of the third part, and dated the 16th day of July, 1864, and acknowledged by said Sherman and Kendall before Return J. Meigs, clerk of the supreme court of the District of Columbia, on the day and year aforesaid, and by Louis S. Corvell before John Cadwallder, judge of the United States district court for the eastern district of Pennsylvania, and on the 20th day of July, 1864, and said deed of conveyance was recorded on the 21st day of December, 1864, by the clerk of the probate court for Santa Fé county, this Territory.

That on the 18th day of August, 1854, Charles E. Sherman, Louis S. Coryell, Abraham Rencher, Ferdinand W. Risque, Joseph T. Walker, Nathaniel M. Miller, Andrew J. O'Bannon, and Elisha Whittelsey, being owners as tenants in common of divers tracts of lands, mines, etc., in the Territory of New Mexico, executed articles of association, under the name of the New Mexico Mining Company, by which articles said Sherman, Coryell and Rencher were appointed trustees, and that it was agreed that said lands, mines, etc., should be immediately conveyed to trustees, and become vested in them and their successors; that a majority of such trustees could act, but three-fourths of the shareholders should agree upon the disposition of the property of the association; that a majority of the shareholders might remove any or all of the trustees, and select others in their stead; that on June 6th, 1864, Rencher was removed by a majority of the shareholders as trustees, and John N. Kindel appointed
295 in his place; that on the 1st day of February, 1858, by an act of the legislature of New Mexico, the parties of the first part Sherman and Coryell, were incorporated as the "New Mexico

Mining Company," that said act was presented and not disapproved by the Congress of the United States, and the charter was accepted by the parties named, and that more than three-fourths of the shareholders requested the conveyance to be made.

That the lands and property conveyed by this deed are described as "all that certain parcel of land on which is situated a gold mine, formerly known by the name of 'Santa Rosalia,' being in the Real de Dolores in the county of Santa Fé in the said Territory of New Mexico, the vein of said mine, traversing from north to south the mountain called 'Oso,' and bounded and described as follows, that is to say: Measuring from east to west under the said vein fifteen varas, measuring north from the mouth of the mine eighty varas, to the southern boundary of the mine formerly known by the name of 'Santo Niño' and measuring five hundred and twenty varas, also that tract of land measuring a distance of two leagues from the said mine to all the cardinal points of the compass, the same containing sixty-nine thousand four hundred and fifty-eight acres, and thirty-three hundredths of an acre, as certified to by the surveyor general of New Mexico, and surveyed under the date of the tenth day of September, 1861, as 'plat of Ortiz Mine grant,' and now on file in the General Land Office in the Department of the Interior of the United States at the city of Washington."

XIII. That on the eighth day of November, 1860, Abraham Rencher, Elisha Whittelsey, Ferdinand W. Risque, Andrew
296 J. O'Bannon, Charles E. Sherman, Nathaniel M. Miller, Joseph T. Walker, by his legal representative, David Walker, petitioned by their attorney, John Watts, the then surveyor general of this Territory, A. P. Wilbar, to examine their title to the grant, the property and the lands in question in this suit, and approve the same, and recommend its final confirmation to the Congress of the United States; that on the 24th day of November, 1860, the said A. P. Wilbar did render a decision approving the title of the said petitioners to a mine, the "Santa Rosalia," the Oso spring and the commons and pasture grounds within two leagues measured from the mine to the four cardinal points.

That by an act of the Senate and House of Representatives of the United States of America in Congress assembled entitled "An act to confirm a certain land claim in the Territory of New Mexico, approved March 1st, 1861," the Congress of the United States did confirm the grant and lands in question in this suit, the same being designated as private land claim No. 43 by the surveyor general of New Mexico dated November 24th, 1860.

That on the 14th day of August, 1861, the survey of the said Ortiz Mine grant was completed by Thomas Means, a United States deputy surveyor, by the authority and under the direction of the then surveyor general of the United States for this Territory, and that said deputy United States surveyor certified that the grant contained 69,458.33 acres of land; that the correctness of this survey and the particular location of said grant or tract of land was under consideration by the Commissioner of the General Land Office, and that on June 19th, 1875, said Commissioner rendered

his opinion setting aside and disapproving said survey, and directed the surveyor general of the Territory of New Mexico to cause a new survey of such tract and grant to be made; that an appeal was duly taken from such opinion and order of said Commissioner to the Secretary of the Interior, and on April 22nd, 1876, said Secretary reversed the opinion and decision of such Commissioner and approved such survey, and directed that a patent should issue thereon to the respondent; that, on the 20th day of May, 1876, a patent for the property, lands and premises in question in this suit
297 signed by U. S. Grant the then President of the United States was issued to the New Mexico Mining Company, and to its successors and assigns, by the United States of America, for the lands and premises therein described containing 69,458.33 acres, less 259 acres conflict with Cañon del Agua and San Pedro grant.

XIV. That on the 20th day of January 1880, the said The New Mexico Mining Company conveyed the said property in question in this suit to Stephen B. Elkins and Jerome B. Chaffee by deed of conveyance by Harry D. Sedgwick as its president and countersigned by Z. Staab as its secretary and treasurer, and having the corporate seal affixed thereto and acknowledged by the said Sedgwick as president of the said corporation, before Charles Donohue, one of the three judges of the supreme court of the State of New York on the day and year last mentioned. That on the 28th day of January, 1880, the said deed of conveyance was recorded in the office of the probate clerk of Santa Fé county, this Territory.

That on the 14th day of April, 1884, Stephen B. Elkins and Jerome B. Chaffee conveyed the said property in controversy in this suit to the New Mexico Mining Company, but from this conveyance is reserved the amount of 15,026.06 acres of land off of the north side of the Ortiz Mine grant, the lands and property mentioned in this suit conveyed by said Elkins and Chaffee to the Cerillos Coal and Iron Company (this includes the 11,410 acres in conflict with the Mesita de Juana Lopez grant, No. 64.)

298 That Stephen B. Elkins acknowledged said deed before Charles Edgar Mills, a commissioner for New Mexico in New York on the 4th day of April, 1884, and by Jerome B. Chaffee before David B. Mitchell, a commissioner for New Mexico and Colorado, on the 8th day of April, 1884; that the said deed of conveyance was on the 12th day of March, 1885, recorded in the office of the probate clerk of Santa Fé county, this Territory.

XV. That the loss of the original deeds from Maraquita Montoya to John Greiner, and from John Greiner and wife to Charles E. Sherman and others, and from Charles E. Sherman and others to the New Mexico Mining Company, and from the New Mexico Mining Company to Stephen B. Elkins and Jerome B. Chaffee has been sufficiently accounted for, and that the certified copies introduced by respondents are in evidence, and should be received as such.

Possession.

XVI. That the said Jose Francisco Ortiz held possession of the property as described in the original writ of possession from the date of the grant to him and Ignacio Cano up to the time of his death, to wit: on the 22nd day of July, 1848.

That after his death, his surviving widow, Maraquita Montoya, took and held possession from that time up to the 20th day of December, 1853, when she sold, transferred and delivered the possession of the property in the deed of conveyance to John Greiner.

299 That the said John Greiner took possession of the property as described in said deed of conveyance on the 26th day of December, 1853, and that he and all his assigns held actual, open and notorious possession of said property from that day until the date of filing complainant's cross-bill in this suit. That such possession was held by employing an agent or agents to live on the property at the village of Dolores, near the said "Santa Rosalia mine," and by making large and extensive improvements on the property, in building a large stamp mill at Dolores, and many other acts, open and notorious, indicative of ownership of the property. But the evidence does not show that the respondents or their grantors were in actual, physical possession from January 28th, to and including July 11, 1884.

That such claim of ownership and possession was made by the respondents, The New Mexico Mining Company, Stephen B. Elkins and Jerome B. Chaffee, and all their grantors, under and by virtue of the grant made by the Mexican government to Jose Francisco Ortiz and Ignacio Cano, on the 10th day of December, 1833, and through divers mesne conveyances, to the time of the filing the cross-bill in this suit.

XVII. That on or about the year 1826, the discovery of gold was made in the vicinity of the mine of "Santa Rosalia," and that the mining camp or settlement was called "Real de Dolores;" that the settlement became somewhat extensive in population, containing several hundred people and many houses and stores; that the people have continued to reside and make their homes at the said town of Real de Dolores all the time from the said year 1826 to the

300 time of filing this suit, and are still so living there; that the people worked the gold mines there for a living, and supported themselves and families from the proceeds of the mines they worked; that many of the residents at the Real de los Dolores owned cattle, sheep and horses, and that they have, during all this time, pastured their animals on the lands and premises in question; that since the American army came to Santa Fé in 1846, many people have mined at said town of Real de los Dolores; that from 1867 until 1882, miners and prospectors were there at work, extracting gold and using the proceeds; that the entire town of Real de los Dolores and all the mining referred to in the evidence is on the Ortiz Mine grant, the property and lands in controversy; that there has been no effort on the part of the respondents or any of their

grantors to eject the people from the said grant, nor in any way to prevent them from using the wood, water and pasture lands of the grant, and the proceeds of the mines, except the mine of Santa Rosalia, and the house that Juan Ortiz lived in, and the one mentioned in the transfer by Maraquita Montoya to John Greiner.

XVIII. That the evidence so introduced, fails to describe that those who have, with their ancestors resided continuously within the boundaries of the said lands in controversy in this suit, since 1826, made any claim of title, except by prescription; that those persons who have located and worked mines within the boundaries of the lands in controversy since 1846 have held such claims by *piedes possessio*, or by purported location made in accordance with the United States mining statutes, but not by or through any paper, title or claim of title.

301 *Conflict of Surveys of the Ortiz Mine Grant, Private Land Claim No. 43, and the Mesita de Juana Lopez Grant, Private Land Claim No. 64.*

That there is a conflict in the surveys of the Ortiz Mine grant, private land claim No. 43, and the Mesita de Juana Lopez grant, private land claim, No. 64. That the Ortiz Mine grant, No. 43, was made by the government of Mexico on the 18th day of December, 1833, and was approved by surveyor general for New Mexico November 24th, 1860, and recommended for confirmation, and that it was confirmed by Congress March 1st, 1861, and the survey was made in August, 1861, and the survey certified to by the surveyor general on the 10th day of September, 1861, as containing 69,458 acres. That the Mesita de Juana Lopez, No. 64, was made by the government of Spain on the 18th day of January, 1782, and was examined, approved and recommended for confirmation by the then surveyor general for New Mexico on the 29th day of November, 1872, and that it was surveyed and the survey and plat approved by the surveyor general for New Mexico February 28th, 1877, and that it was confirmed by Congress January 28th, 1879.

That the area in conflict in the two grants amounts to about eleven thousand four hundred and ten acres.

That the act confirming grant No. 43 contain- the following: Provided: that the foregoing confirmation shall only be construed as a quitclaim or relinquishment on the part of the United States and shall not affect the adverse rights of any other person or persons whomsoever.

302 That the act confirming grant No. 64 contained the following: "Provided that the foregoing confirmation shall only be construed as a quitclaim or relinquishment of all title or claim on the part of the United States in and to said private land claim, and shall not affect the adverse rights of any person or persons to the same, nor shall the United States be liable to make compensation for any part of said land to which there are or may be any adverse right or claim."

That the evidence fails to establish that any one was in actual

possession of that portion of the Mesita de Juana Lopez grant in conflict with the Ortiz grant, claiming title to same through or under the grant made January 18, 1782, by the gover-ment of Spain until about the year 1881, when the coal lands were leased by those claiming title under the grant, and that since that time there has been a mixed posses-ion as to that portion in conflict.

Pleadings.

That at the February, 1865, term of this court, Maria Antonia Cano, Teresa Cano, Ignacio Cano and Jose Maria Cano filed their bill in chancery against the New Mexico Mining Company, John Greiner and Maraquita Montoya, alleging in said bill that they were the direct or forced heirs of Ignacio Cano, and alleging that said Ignacio Cano, their father, had never transferred his interest in the property granted to said Ig-cio Cano and Jose Francisco Ortiz by the Mexican nation on the 18th day of November, 1833, and that they were entitled to an undivided one-half interest in the same. I find that the property involved in that suit, doc. No. 9, was the same property involved in this suit, and that the New Mexico Mining Company was the same respondent in this cause.

303 That at the February, 1868, term of this court, the said cause was dismissed for want of prosecution, and that the dismissal was made after the evidence of two witnesses had been taken on the part of the respondents, and that the style of this cause was The Heirs of Ignacio Cano against The New Mexico Mining Company, John Greiner and Maraquita Montoya.

XIX. That at the July, A. D. 1880, term of this court, Elias Brevoort filed his bill of complaint against the New Mexico Mining Company *et al.*, alleging and claiming title through mesne conveyances from the collateral heirs of Jose Francisco Ortiz, the heirs of said Ortiz' only brother, Jose Ignacio Ortiz, and his only sister, Maria de la Luz Sanchez, to all the said Ortiz Mine grant, the same property in controversy in this suit, alleging that the mutual will made by Jose Francisco Ortiz and his wife, Maria Inez Montoya, was fictitious and void.

That the title and number of this cause was Elias Brevoort against The New Mexico Mining Company *et als.*, No. 1075.

That at the February, 1881, term of this court, Nasario Gonzales filed his plea of intervention against all the parties in cause No. 1075, alleging and claiming title to a portion of the said Ortiz Mine grant on the northwest corner by an older and superior title through an older Mexican grant known as the "Gotera" grant; that there was never any proof taken in the matter of the plea of intervenor Gonzales.

That a great deal of testimony for both parties was taken in case No. 1075 and filed, and that the master's report was made, filed and confirmed by the court, and exceptions to said report were
304 made and filed, and that on the 27th day of June, 1884, complainant filed a motion to dismiss this cause "without prejudice." That on the 12th day of July, 1884, the court denied the

motion to dismiss "without prejudice." That on the 16th day of July, 1884, the said cause No. 1075 was dismissed by the court.

XX½. That on the 14th day of July, 1884, on motion of the respondents the cause was set down for hearing upon the exceptions to the master's report, and final decision on the 15th day of July, 1884, and that on said 15th day of July, 1884, it was ordered, adjudged and decreed that the cause be and the same hereby is dismissed.

XX. That at the February, 1883, term of this court, Edward T. Farish, Benjamin M. Read, Larkin G. Read, Modesto Ortiz, Teodora Ortiz de Martinez and Transito Martinez, husband of Teodora Ortiz de Martinez, filed their bill of complaint against the New Mexico Mining Company, Stephen B. Elkins, Jerome B. Chaffee, R. W. Donnell, Lars Anderson, and Elias Brevoort, alleging that they were the heirs and legal representatives of Ignacio Cano, deceased, and claiming title through said Cano to a portion of the lands and premises in controversy in this suit, alleging that said Cano never transferred to said Jose Francisco Ortiz or to any one else his interest in said Ortiz Mine grant, so granted to him and said Ortiz by the Mexican government, and that the respondents were the same person respondents in this case. That the property was the same in that case that is in controversy in this case and no other. That the title of that case was "Edward T. Farish *et al. vs.* The New Mexico Mining Company *et als.*," No. 1490.

That on the second day of July, 1886, by a stipulation
305 signed by Francis Downs, solicitor for E. T. Farish *et al.*, in No. 1490, and by Catron, Thornton and Clancy, solicitors for respondents, The New Mexico Mining Company *et al.*, and Gildersleeve & Knaebel, solicitors for Elias Brevoort, in No. 1075, was filed permitting the said Charles H. Gildersleeve to file his cross-bill in No. 1490. That on the 8th day of July, 1886, Brevoort, complainant in No. 1075, and John H. Knaebel, one of his solicitors, and claimant to one-quarter interest in the property in this suit sold their interest to the respondent, The New Mexico Mining Company and dismissed the suit so far as they could.

That the court on the 2nd day of July, 1886, made an order allowing Gildersleeve to file his intervening petition showing his interest in the property in controversy, and ordering that the stipulation should be spread upon the records of the proceedings in this case, in cause No. 1490, Farish *et al. vs.* The New Mexico Mining Company *et al.*

That on the 6th day of October, 1887, the cause No. 1490, Farish *et al. vs.* The New Mexico Mining Company *et al.*, was dismissed by the court, on the motion of respondents, on plea of *res adjudicata*, plead in bar of said action, with this proviso: "Provided, however, that this order shall not prejudice any rights that C. H. Gildersleeve may have acquired as intervenor in this cause, but that the same shall stand as they may now be for the further order of this court."

That the amended cross-bill of Charles H. Gildersleeve is now cause No. 1865.

XXI. That on the 16th day of December, 1886, the judge in vacation filed an opinion in writing allowing the petition of Gildersleeve for cross-bill as in 1865, and permitting him to make such
306 amendments to the cross-bill as will show the interests claimed by him as described in the cross-bill filed on the 18th day of June, 1886, in No. 1490, and holding that Brevoort's dismissal of the cross-bill affected only his own interest and Knaebel's, and did not dismiss the cross-bill so far as Gildersleeve's interest was concerned, denying also the motion of the respondents to vacate the entry made in this cause allowing the cross-bill to be filed.

XXII. That the heirs of Jose Ignacio Ortiz and Maria de la Luz Ortiz de Sanchez, brother and sister of Jose Francisco Ortiz, were not in possession, either active or constructive, at the time they made deeds of conveyance of their alleged interest in the Ortiz Mine grant, claiming to be collateral heirs of Jose Francisco Ortiz, and that said alleged collateral heirs nor their direct ascendants ever were at any time in possession of said property, either active or constructive. That said Brevoort had notice of the fact that none of his grantors were in possession. That the respondents, The New Mexico Mining Company, were then in actual possession of a part of the grant, claiming title to all of it. That at the time the deed was made from Brevoort to Gildersleeve and Knaebel, the respondents, The New Mexico Mining Company, *was* in possession, either actual or constructive. That it appears from the evidence that Gildersleeve & Knaebel had notice of the fact that Brevoort was not in possession, and that respondents were in possession. That it appears also from the deed of conveyance and from the evidence of the complainant that the deed of conveyance for one undivided moiety or half part of said grant was given in consideration
307 of money advanced from the complainant to said Brevoort for the maintenance of the suit, and for legal services of said Gildersleeve & Knaebel in filing the bill in chancery, and investigating the title, and prosecuting it to a final conclusion.

XXIII. That the New Mexico Mining Company had notice of the Gildersleeve & Knaebel deed for an undivided half interest in the Ortiz Mine grant under deed from Brevoort, and the consideration paid and to be paid when it bought the grant from Stephen B. Elkins and Jerome B. Chaffee, and that the respondent corporation had notice of the deed from Brevoort to Gildersleeve & Knaebel, when Brevoort deeded to it on the 8th day of July, 1886.

Recapitulation of Findings of Facts.

XXIV. 1. That the property in controversy is a Mexican grant, made by the government of Mexico on the 18th day of December, 1833, to Jose Francisco Ortiz and Ignacio Cano.

2. That the grant consisted of a gold mine or vein, and surface ground measuring from east to west one hundred and two varas, and from north to south, six hundred varas. That the vein or mine was called the mine "Santa Rosalia."

3. That with the mine, was granted to them as water supplies to

work their machinery the Oso spring, contiguous to the Jose Francisco Ortiz dwelling, as well as other spring- which may be included within the limits of the commons, which may be granted to them in the direction of the east, and as pasture commons, two leagues from each of the four cardinal points of the mine.

4. That it is alleged and admitted that Ignacio Cano sold and transferred all his interest in the property so granted to Jose Francisco Ortiz.

308 5. That Jose Francisco Ortiz and his wife, Maria Ines Montoya, made a mutual will on the 15th day of August, 1841, by which it was agreed that the survivor should inherit all the property left by the deceased.

6. That at the time of making said mutual will, Jose Francisco Ortiz was a soldier in actual service in the Mexican army with the rank of lieutenant.

7. That he did not belong to the army when he died, and that he had not belonged to it for about three years previous to his death.

8. That said mutual will was made before a constitutional alcalde, and by operation of law, a judge of the first instance.

9. That said mutual will was signed in the presence of alcalde, by both Jose Francisco Ortiz and his wife, Maria Inez Montoya (she making her cross, while some one signed her name), and it was signed by only two subscribing witnesses, and that it was never proved, published or admitted to probate as the last will of Jose Francisco Ortiz, or any one else.

10. That Jose Francisco Ortiz died in July, 1848, and that his widow held possession of the will until 1853, and that she and her niece, Frsncisca Hinojos, who lived in the house with her, held possession jointly of the said will, until December, 1870, when the widow died, and that said Francisca Hinojos held possession of it until 1873, when she sold and delivered it for one thousand dollars to the legal representative of the New Mexico Mining Company, respondent herein.

11. That there is no evidence to show that said Maria Inez Montoya ever claimed the property in controversy as an inheritance from her said husband through, under or by virtue of said mutual will, except in deed of conveyance to John Greiner, where it recites that "she is the widow and sole heir" of Jose Francisco Ortiz.

309 12. That the complainant, Charles H. Gildersleeve, claims in his amended cross-bill to be the owner in fee-simple of an undivided one-fourth part of all the property in controversy in this suit, through and under mesne conveyances from the collateral heirs of Jose Francisco Ortiz, alleging that the mutual will purporting to have been made by Jose Francisco Ortiz and his wife is fabricated, fictitious and void, and that the widow did not inherit the property from her husband.

13. That the chain of title from the descendants of the brother and sister of Jose Francisco Ortiz (his reputed collateral heirs) is sufficient to vest in Gildersleeve an undivided one-quarter interest in the property in question, if his grantors had a perfect title.

14. That the New Mexico Mining Company, respondent, is a duly

organized corporation, existing and doing business under the laws of the Territory of New Mexico, and claims title in fee-simple to all the grant of lands and premises in question, through and under the mutual will of Jose Francisco Ortiz and through and under various mesne conveyances from the widow of Jose Francisco Ortiz.

15. That the chain of title is sufficient to vest in the New Mexico Mining Company a fee-simple title to the property in question, if the original grantor, Maraquita Montoya, widow of Jose Francisco Ortiz, had a perfect title.

16. That the respondent alleges that complainant's action is barred by the statute of limitation.

17. That the action of complainant is barred by the plea of former adjudication.

18. That the action of the complainant is void on plea of champerty and maintenance.

All of which is ordered and certified by the court.

JAMES O'BRIEN,
Chief Justice.

310 And afterwards, to wit, on the 7th day of January, 1892, there was filed in the office of the clerk of the said supreme court of New Mexico a bond; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, Charles H. Gildersleeve, principal, and Lehman Spiegelberg and Eugene A. Fiske, sureties, are held and firmly bound unto the The New Mexico Mining Company in the penal sum of one thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, and our heirs, executors, and administrators.

Witness our hands and seals this 7th day of January, A. D. 1892.

The condition of the above obligation is such that whereas, at the July term, A. D. 1891, of the supreme court of the Territory of New Mexico, the said court affirmed the decree and decision of the district court of the first judicial district of said Territory, sitting within and for the county of Santa Fé, in a certain cause pending in said supreme court, entitled "Charles H. Gildersleeve, plaintiff in error, *vs.* The New Mexico Mining Company *et al.*, defendants in error," No. 409; and whereas the said Charles H. Gildersleeve has prayed for and has been granted an appeal from the said decree and decision of said supreme court to the Supreme Court of the United States:

Now, therefore, if the said Gildersleeve shall duly and effectively prosecute his said appeal and shall pay and satisfy all decrees or judgments that may be rendered against him by said Supreme Court of the United States and shall pay all costs that may be adjudged against him or which he may become liable by law to pay, then this obligation shall be null and void; otherwise the same shall be and remain in full force and effect.

CHARLES H. GILDERSLEEVE. [SEAL.]
LEHMAN SPIEGELBERG. [SEAL.]
EUGENE A. FISKE. [SEAL.]

Approved by me this 7th day of January, 1892.

EDWARD P. SEEDS,
Associate Justice of the Supreme Court of New Mexico.

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

Before me, the undersigned, clerk of the supreme court of said Territory, on this seventh day of January, 1892, personally appeared Charles H. Gildersleeve, Lehman Spiegelberg, and Eugene A. Fiske, to me personally known to be the persons who executed the foregoing obligation, and acknowledged to me that they executed the same for the uses and purposes therein expressed; and the
311 said Lehman Spiegelberg and Eugene A. Fiske, being duly sworn, each for himself deposes and says that he is worth the sum of one thousand dollars over and above his just debts and liabilities, and the amount by law exempt from execution.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of the supreme court of the Territory of New Mexico the day and year last above written.

H. S. CLANCY, *Clerk.*

Approved by me this 7th day of January, 1892.

H. S. CLANCY, *Clerk.*

And heretofore, to wit, on the 24th day of July, 1891, there was filed in the office of the clerk of said court the opinion of the judges of said court in said cause, a copy of which is hereunto annexed in accaccordance with the amendment to rule 8th of the Supreme Court of the United States, to be herewith transmitted, which is in words and figures as follows, to wit:

CHARLES H. GILDERSLEEVE }
vs.
NEW MEXICO MINING COMPANY *et al.* }

Error to district court, Santa Fé county.

H. L. Warren, Thomas Smith, G. C. Preston, and E. A. Fiske, for plaintiff in error.

E. L. Bartlett, for defendants in error.

O'BRIEN, *C. J.:*

The subject-matter of the controversy involved in this suit is a tract of mining and pastoral land, embracing about 69,458 acres, situate in Santa Fé county, known as the "Ortiz Mine grant," conceded, in accordance with the laws of the Republic of Mexico, in the year 1833, to Jose Francisco Ortiz and Ignacio Cano. The latter, prior to his death, in 1836, conveyed to his co-tenant, Ortiz, all his title and interest in the grant. It is not disputed that thereafter, in the year 1840 or 1841, Jose Francisco Ortiz and Doña Ines Montoya,

his wife, jointly executed an instrument in writing, known as a "mutual will," of the tenor following:

{Third stamp (stamp), two reals, for the years of one thousand eight hundred and forty and one thousand eight hundred and forty-two.}

At the city of Santa Fé, capital of the department of New Mexico, on the fifteenth day of the month of August, of one thousand eight hundred and forty-one, before me, the citizen Albino Chacon, constitutional alcalde of the same, and by operation of law judge
312 of the first instance, those of my attendance being present, with whom I act by special authority, appeared Don Jose Francisco Ortiz, a resident of the Real de Oro, and his living wife, Doña Maria Ines Montoya, both of whom I certify I know; and they together stated that whereas, God has not been pleased to give them a child or forced heir living, they agree with each other that the one who shall survive the death of the other shall be the sole heir to everything that may be recognized as their property, in live stock, real estate, chattels, or in any other manner, without any relative or either of them preventing it, through any privileged right that he may allege; but in case that it should so happen, and that it should be attempted by any of them to institute suit against the surviving party, the testators from this time request the national justices, and in particular those who may have cognizance of this matter, that they be no- heard either in or out of court, but rather they give authority to the judges in order that by all the rigor of law they may force and compel them to what is stipulated by this document, and to the guaranty thereof, as fully as if it were in definitive sentence pronounced in adjudicated cause, acquiesced in by them, and not appealed from.

In witness and guaranty whereof they thus request me to authenticate it, which I do according to the provisions of law, with my attending witnesses; to which I certify.

"JOSE FRANCO. ORTIZ.
"MARIA INES MONTOYA.

"JOSE ALBINO CHACON.
"(De Assa.): JOAQUIN YOMOJANO.
"(De Assa.): FRANCO. BACA Y ORTIZ."

Jose Franco. Ortiz dying in 1848 in the possession of the land, his widow, Maria Ines Montoya, continued in possession till 1853, when she conveyed the same to one John Grenier, who held such title until August 19, 1854, when he conveyed the same to Charles E. Sherman and his associates, who in turn, on July 10, 1864, conveyed the same to the New Mexico Mining Company, which took immediate possession thereof, and it and its co-respondents have since continued in the possession of the whole or a portion thereof; that said Ortiz grant, in 1861, was duly confirmed by an act of Congress, and thereafter, on May 20, 1876, a patent therefor was duly issued to the New Mexico Mining Company. The patent contains, among other exceptions, the following reservation or pro-

viso: "The confirmation of this said claim and this patent shall only be construed as quitclaim or relinquishment on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever." Plaintiff in error asserts his deraignment of title to an undivided one-fourth interest in
313 the premises as follows: Denying the validity of the "mutual will" hereinbefore set out, he claims that said Jose Francisco Ortiz died intestate in 1848, leaving no direct heirs, but that he left as "col-atteral heirs" an only sister, Maria de la Luz Ortiz, and Abran, Estefan, Ramon, Esmerejildo, Prudencia, and Macedonia Ortiz, children of his deceased brother, Ignacio Ortiz; that said Maria de la Luz, sister of Jose Francisco Ortiz, subsequently intermarried with one Manuel Sanchez, and that she died intestate, leaving five children surviving; that one of said children, Rosaria, married one Rafael Romero, and that she some time thereafter died intestate, leaving one child as heir, a daughter, Josefa Romero, who afterwards married Jesus Garcia. It appears in evidence, and it is not seriously disputed, that all of the foregoing representatives of Jose Francisco Ortiz, to wit, the children of his brother Ignacio and the children and grandchildren of his sister Maria, had conveyed, at different times before the commencement of this suit, all their estate in the property in controversy to Elias Brevoort, and that the latter, on July 1, 1880, conveyed an undivided one-half thereof to the plaintiff in error and one John H. Knaebel; that Knaebel, on July 7, 1886, reconveyed his interest therein to said Brevoort. The contention of the plaintiff in error is that said "mutual will" is not only false and fraudulent, but void for want of proper execution, and hence that the widow of said Jose Francisco Ortiz only took at his death an undivided one-half of his realty; that said collateral heirs of Ortiz took the remaining moiety, and that through their several and other mesne conveyances to his grantor, Brevoort, he is entitled to an undivided one-fourth interest in the whole of the grant. Under the pleadings the issues presented were: First, whether the interest in the grant of which Ortiz was seized passed at the time of his death, in 1848, by virtue of a mutual will, to his widow, and from her to the respondent The New Mexico Mining Company, or whether it passed to the descendants of his brother and sister, and from them to the complainant, to the extent of the quantity claimed in his bill of complaint; and, second, admitting that the interest of Ortiz descended to the heirs of his brother and sister, is not complainant barred of the relief sought by the statute of limitations?

The suit from its commencement, in January, 1883, to the 26th day of December, 1888, when the final decree dismissing the bill was entered, had undergone various mutations as to parties, pleading, reports, and rulings, and it would subserve no useful purpose to attempt to give a summary of such complicated changes. The case was submitted to a master, and complainants introduced
314 proofs before him at divers times tending to support the allegations contained in his bill. Defendant introduced in evidence the mutual will and proof tending to show that the

same had been executed by Ortiz and his wife in the presence of the alcalde and two assisting witnesses, and that such was the usual manner of executing wills in New Mexico at the time this will was made and for more than 30 years prior thereto. Defendant also introduced evidence tending to prove that upon the death of Jose Francisco Ortiz his widow, claiming under the will, took possession of the premises in question, and that she continued in such possession, openly and notoriously, until December, 1853, when she conveyed them; that her grantee entered into the possession thereof and continued therein until they were conveyed to the New Mexico Mining Company, in 1864, when the latter entered into and has ever since continued in the actual possession thereof. There was also evidence tending to show that the respondent company and its grantees have worked and operated the mines upon said grant, built a large number of houses thereon and kept tenants continually occupying said houses, built and operated two separate gold mills, and spent several hundred thousand dollars in the improvement of the property and regularly paid the taxes thereon. Complainant offered no testimony in rebuttal of such proof. Testimony was also introduced tending to show that there never had been such an office as an escribano or notary within this Territory, as appeared from the records of the surveyor general's office, and that such office was the repository of the ancient Mexican archives and of wills, deeds, and other written documents affecting real estate; that the custodian of such office had thoroughly examined all of the wills upon file, some of which went back for a period exceeding 100 years, and that more than 90 per cent. of them had been executed before an alcalde and two witnesses. The master, when the case was last heard, found in favor of the respondents upon the plea of the statute of limitations, and passed upon no other matter, except that he found the mutual will to be invalid. Upon the final hearing of the master's report that court confirmed the same, and dismissed the bill, deciding that the will of Ortiz was valid and operative, and that the statute of limitations had run against complainant's cause of action. Complainant, by writ of error, brings such decree to this court for review.

The errors assigned by complainant to warrant a reversal of the judgment are seven in number. The two principal ones relied upon in argument are, first, error committed in the district court in holding and decreeing that the bill of complaint and cause of action therein set out was and is barred by the statute of limitations, and in overruling plaintiff's exception to so much of the master's
315 report as found in favor of the bar of the statute. Second, error committed by the court below in holding and decreeing that the "mutual will" offered in evidence by the defendant was a valid and legal will, and in sustaining the exceptions of the defendant in error to so much of the master's report as held that said will was inoperative and invalid.

It is not disputed that Jose Francisco Ortiz was in the actual possession of a portion of the grant at the time of his death, in 1848, claiming the whole of it, and that he was succeeded in such possession by his widow, who continued therein until 1853, when her

grantee, John Grenier, took and held such possession until he conveyed his estate therein to Sherman and others, and took and continued such possession until 1858, when they conveyed to the New Mexico Mining Company. The latter company and its associates appear to have taken immediate possession under the deed, and to have continued to use and occupy at least portions thereof to the present time. Complainant does not claim possession for himself, nor in behalf of any of his grantors, since the death of Ortiz, in 1848. His proof shows that strangers at different times had entered and used certain portions of the grant, but in no way connects his claim of title with any real or supposed rights accruing to such occupants by virtue of such possession. The boundaries of the grant had not been fixed until September, 1861, when the surveyor general of New Mexico transmitted to the Commissioner of the Land Office at Washington an official survey of the tract known as "private land claim No. 43." It appears that Congress, by an act approved March 1, 1860, entitled "An act to confirm a certain private land claim in the Territory of New Mexico," had, on the report of the surveyor general of the Territory, dated November 24, 1860, and before the filing of the official survey and the field-notes in the Commissioner's office, confirmed the grant according to the recommendation of the surveyor general and in advance of the filing of the official description of the grant. The act became operative to pass the title to the grant at least as soon as its boundaries were definitively fixed by the official survey, etc., of the surveyor general filed with the Commissioner of the General Land Office. The history of the grant and the language of the act of confirmation leave no doubt as to the intention of Congress: "Provided that the foregoing confirmation shall only be construed as quitclaim or relinquishment on the part of the United States and shall not affect the adverse rights of any other person or persons whomsoever." In 1876 (May 20th) a patent issued
316 to the New Mexico Mining Company for "the tract of land embraced and described in the foregoing survey, excepting and reserving from the transfer by these presents so much of the land embraced in said survey as is included within the survey of the Cañon del Agua grant, approved by the surveyor general of the Territory of New Mexico on the 16th day of October, 1866, and patented to Jose Serafin Ramirez, his heirs and assigns, on the 1st day of July, A. D. 1875, and estimated to contain about 259 acres, as aforesaid;" and with the further stipulation that, "in virtue of the provisions of the aforesaid act of Congress approved March 1, A. D. 1861, the confirmation of this claim and this patent shall only be construed as quitclaim or relinquishment on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever." It is clear that, so far as the rights of the parties to this suit are concerned, the act of confirmation of 1861 was a grant *in præsenti*, and in effect conveyed the title as soon at least as the boundaries were officially and definitely ascertained. It is true in the patent about 259 acres, covered by the act of confirmation, are excepted and reserved to Jose Serafin Ramirez. The right

to make such reservation is expressly stipulated in the act of confirmation. The patent operated only as convenient documentary proof of the original grant and of its subsequent ratification by Congress on the terms therein expressed. Langdeau *v.* Hanes, 21 Wall., 521. Elias Brevoort, through whom complainant claims title, obtained deeds in 1873 from the col-atteral heirs of Jose Francisco Ortiz purporting to convey all the interest which they had in the grant. Neither plaintiff nor any one of those through whom he claims title was ever in the possession of the premises or any part thereof, either in privity with or adverse to defendants or their grantees, at least since 1848. Defendants, on the contrary, maintain and offered evidence tending to prove that for more than 20 years prior to the commencement of this suit they had been in actual possession of a portion and in the constructive possession of all the premises in controversy, openly, continuously, and adverse to all the world, claiming title to the whole thereof through the grant and the act of confirmation of 1861. Section 1880, Comp. Laws, N. M., provides that where any person shall be in possession for ten years of any land granted by the government of Spain or Mexico, "holding or claiming the same by virtue of a deed or deeds of conveyance, devise, grant, or other assurance purporting to convey an estate in fee-simple, and no claim by any suit in law or in equity effectually prosecuted shall
317 have been set up or made to said lands, tenements, or hereditaments within the aforesaid term of ten years, then and in that case the person or persons, their children, heirs, or assigns, so holding possession as aforesaid shall be entitled to keep and hold in possession such quantity of land as shall be specified and described in his, her, or their deeds of conveyance, devise, grant, or other assurance as aforesaid in preference to all and against all and all manner of person or persons whatsoever."

We are of opinion that the evidence in the cause amply sustains the finding of the master that the bar of the statute had attached before complainant brought his action. The testimony, it is true, is somewhat conflicting as to the nature and extent of defendants' actual possession; still there is enough evidence, in our opinion, tending to show that defendants had maintained an open, adverse, and continuous possession under claim of title in fee for more than ten years before the bringing of this suit. This, we hold, is sufficient to bar plaintiff's right of recovery.

This brings us to the consideration of the second assignment of error, the invalidity of the "mutual will" of Jose Francisco Ortiz and wife. This instrument was executed within the limits of the present Territory, while the same was a political department of the Republic of Mexico. It is a very peculiar document, almost unknown to our jurisprudence. If it were recognized by the laws of the sister Republic and executed in accordance therewith, or in accordance with prevailing customs and usages having the force of law, it is the duty of the courts of this Territory to give it the same legal effect as it would receive had no change of government taken place. "The laws heretofore in force concerning descents, distributions,

wills, and testaments as contained in the treatise on these subjects written by Pedro Murillo Velarde shall remain in force so far as they are in conformity with the Constitution of the United States and the State laws in force for the time being."

Section 1, Kearny Code, Sep't 22, 1846.

Leitensdorfer *v.* Webb, 20 How., 177.

Escriche (Dict. de Leg. y Jur., p. 1498) defines such instrument as follows: "A mutual testament is one which two persons reciprocally make in favor of the survivor, as when husband and wife constitute themselves heirs, the one to the other, in case of their dying without forced heirs. In the execution of these testaments, whether open or sealed, the same solemnity should be observed and the same number of witnesses should be present as in those made by a single testator, except that the number of witnesses need not be doubled because of there being two testators.

318 The instrument in question is what is known as an "open" or "nuncupative" testament. The two kinds of wills are thus defined by Velarde (Prac. de Test., cap. 1, p. 3): "As a person may declare his will by writing or by word of mouth, it follows that wills are divided into two classes: written, generally called 'cerado' or sealed, when the testator expresses his will on paper written and sealed, declaring it to be his testament, in the presence of seven witnesses and before a notary, who should sign their names upon the cover or envelope with the testator; nuncupative, which is also called 'abierto' or open and which is the most common, and is authenticated when the testator manifests his will by word of mouth before witnesses with the formalities required by law." After enumerating the several formalities required in the execution of wills he proceeds: "The second formality is the presence of witnesses. For an aberito or open will three are at least required, residents of the neighborhood where the will is made; besides, it should be executed before a notary public or escribano publico. If there be no notary, five witnesses, residents of the neighborhood, should be present, and if that number cannot be obtained, three will suffice." This testament, executed in 1841, one of the joint makers dying in 1848, is an ancient document. No indicia of suspicion, fraud, or alteration appear upon its face. It is found in the custody of those claiming and holding possession of the property referred to therein, including the alcalde Chacon. It purports to have been executed by the parties in the presence of three attesting witnesses. Hence every reasonable presumption should be indulged in favor of its validity. Assuming that five witnesses, residents of the vicinity, could not be obtained to attest its execution, we are of the opinion that the will was executed in the presence of three witnesses, and that such number was sufficient to make its execution regular and valid. Besides, there is abundant evidence showing that the Republic of Mexico never furnished the department of New Mexico with such an officer as an escribano publico before whom wills could be executed according to the provisions of law; that, in such emergency, the people of this distant dependency, *ex necessitat rei*, had been accustomed to execute

such instruments in presence of an alcalde or judge of the first instance before two attesting witnesses; that such custom had been general, continuous, accepted, and recognized as having the force of law for at least a hundred years before the date of the will in question. The expert, Diego Archuleta, a Mexican lawyer and former member of the Mexican congress, swears positively to the existence of this custom. An examination of the archives, deeds, wills,
319 etc., in custody of the proper depository in Santa Fé, corroborates the testimony of the expert on this point. Such being the custom, a will executed in accordance therewith is valid.

Adams *vs.* Norris, 23 How., 353; Panaud *v.* Jones, 1 Cal., 497; Von Schmidt *v.* Huntington, *id.*, 55; Castro *v.* Castro, 6 Cal., 158; Tevis *v.* Pitcher, 10 Cal., 465.

In connection herewith see Pino *v.* Hatch, 1 N. M., 130; Hayes *v.* Bona, 7 Cal., 154.

It is always safe to adopt every reasonable presumption in favor of the validity of an instrument of this character. Husband and wife, in the absence of children, determine, in view of the probable death of the one before the other, to make adequate provision for the wants and comforts of the survivor. The husband dies in 1848. The widow claims and asserts her rights under the will as the absolute owner of all the property of which he died possessed; she disposes of such rights to *bona fide* purchasers; for more than forty years before this suit was commenced they occupy, improve, and pay taxes on this property. Plaintiff's grantor and those through whom such grantor claims title, relatives of the deceased Ortiz, and residing in the vicinity of the grant, remain silent; acquiesce by such silence in the disposition so made of the property for so long a period, while the same is being enhanced in value by the capital and labor of honest purchasers or occupants. In fact, not a word is heard from any of the kindred in relation to the matter until they relinquish for a trifling consideration all their interest therein to plaintiff's grantor. Aside from the merits of the case, public policy does not favor the disturbing of vested rights without very grave and satisfactory reasons. The foregoing views dispose of all questions raised by plaintiff in error and render unnecessary a consideration of the points raised by defendant as to the legal status of the cross-bill and the charge of champerty. We may state, however, as a matter of justice to the professional character of the gentleman charged, that we do not find any ground upon which to base even a suspicion of improper conduct. Finding no error in the record, the judgment should be affirmed.

Lee, Seeds, and McFie, JJ., concur.

320 UNITED STATES OF AMERICA, }
Territory of New Mexico. }

I, H. S. Clancy, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment given, and opinion filed in the cause herein mentioned, or so much

of said record as the appellant herein deems necessary for the proper review of said cause in the Supreme Court of the United States, as the same now appears remaining in my office.

Seal Supreme Court, Territory of New Mexico.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of New Mexico, at Santa Fé, New Mexico, this sixth day of February, A. D. 1892.

H. S. CLANCY, *Clerk.*

321 The Territory of New Mexico to the United States marshal of the Territory of New Mexico, Greeting:

You are hereby commanded that you give notice to New Mexico Mining Company that Charles H. Gildersleeve has appealed from the supreme court of the Territory of New Mexico from a certain judgment and decree of the said supreme court rendered on the 24th day of July, A. D. 1891, in a certain cause then pending therein, wherein Charles H. Gildersleeve was plaintiff in error and the said New Mexico Mining Company was defendant in error, and also that you make known to them that they be before the Supreme Court of the United States held in the city of Washington, D. C., on the first Monday of April, A. D. 1892, to show cause, if any there be, why the said judgment and decree should not be reversed, annulled, and altogether held for nothing and why speedy justice should not thereupon be done between the parties in that behalf.

Witness the Honorable Edward P. Seeds, associate justice of the supreme court of the Territory of New Mexico, and the seal of said court, this 8th day of February, A. D. 1892.

Seal Supreme Court, Territory of New Mexico.

EDWARD P. SEEDS,
Associate Justice, &c.

Attest: H. S. CLANCY,
Clerk of Supreme Court of New Mexico.

322 I, the undersigned, marshal of the *the* Territory of New Mexico, do hereby certify that on the 9th day of February, A. D. 1892, I served the annexed citation on the New Mexico Mining Company by delivering a true copy thereof to Edward L. Bartlett, the solicitor of record of said New Mexico Mining Company in the cause mentioned in said citation.

Dated at Santa Fé, New Mexico, this 9th day of February, 1892.

TRINIDAD ROMERO,
The U. S. Marshal,
By JOSÉ B. ORTIZ, *Deputy.*

[Endorsed:] No. —. Supreme Court United States. Charles H. Gildersleeve, appellant, *v.* The New Mexico Mining Company, appellee. Citation.

323 In the Supreme Court of the United States.

CHARLES H. GILDERSLEEVE, Appellant,
v.
THE NEW MEXICO MINING COMPANY, Appellee. } No. —.

The appellant now comes and says that there is manifest error in the record, proceedings, decree, and decision of this cause, as follows, to wit:

1. The supreme court of the Territory of New Mexico committed error in affirming the decree of the district court of Santa Fé county, in said Territory, and in refusing to vacate, set aside, and reverse said decree of said district court.

2. The said territorial supreme court committed error in holding and decreeing that the purported will of Jose Francisco Ortiz, introduced in evidence in said cause by the appellee, was and is a legal and valid will, legally and properly executed, and was sufficient to and did vest the title of the property in controversy in Mariquita Montoya, the widow of said Ortiz.

3. The said territorial supreme court committed error in holding and decreeing that the purported will of Jose Francisco Ortiz
324 was sufficient to and did vest the title of the property in controversy in the said widow of said Ortiz without the said will ever having been proven, established, or admitted to probate.

4. The said territorial supreme court committed error in holding and decreeing that the cause of action of the appellant was and is barred by the statute of limitations of the Territory of New Mexico.

For which several errors the appellant prays that the said decree of the said supreme court of the Territory of New Mexico may be in all things reversed, vacated, and set aside, and that the appellant may have all other relief in the premises that he may in equity and justice be entitled to.

CHARLES H. GILDERSLEEVE, *Appellant.*

HENRY L. WARREN,
Solicitor for Appellant.

[Endorsed:] No. —. Supreme Court United States. Charles H. Gildersleeve, appellant, *v.* The New Mexico Mining Company, appellee. Assignment of errors. Henry L. Warren, solicitor for appellant.

Endorsed on cover: Case No. 14,979. Territory of New Mexico, supreme court. Term No., 89. Charles H. Gildersleeve, appellant, *vs.* The New Mexico Mining Company. Filed February 20, 1892.